
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

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CENTRAL CALIFORNIA CANNERIES COMPANY,
Appellant.

GRIFFIN & SKELLEY COMPANY,
Appellant.

J. C. AINSLEY PACKING COMPANY,
Appellant.

ANDERSON-BARNGROVER MANUFACTURING
COMPANY,
Appellant.

GOLDEN GATE PACKING COMPANY,
Appellant.

J. F. PYLE & SONS, INC.,
Appellant.

HUNT BROTHERS COMPANY,
Appellant.

SUNLIT FRUIT COMPANY,
Appellant,

vs.

DUNKLEY COMPANY,
Appellee.

No. 2915.

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Reply Brief on Behalf of Defendants-Appellants.

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REPLY BRIEF ON BEHALF OF DEFENDANTS-
APPELLANTS.

PRELIMINARY REMARKS.

We believe there should be, at this time, a word of explanation respecting the length of the briefs filed herein on behalf of the defendants-appellants.

Their length, to a large extent, has been made necessary by the misleading presentation of its case by the plaintiff-appellee, both in this Court and the lower Court.

Furthermore, this litigation is of such importance by reason of the immense amounts involved, that it has been thought proper to fully discuss all of the propositions which would show the plaintiff-appellee to be without right of recovery.

This litigation is not only of importance to the defendants-appellants, but it is of vast importance to the public generally. Necessarily, it will be the ultimate consumer who will be called on to pay the annual tribute demanded by the owner of the Dunkley patent for the privilege of using, in any form of apparatus or machine, the broad *idea of means* monopolized thereby. The immensity of such annual tribute, so demanded, is indicated in the papers, herein filed in this Court, in support of the motion made by the plaintiff-appellee for an order increasing the supersedeas bonds filed in the lower Court by two of the defendants.

Bonds, aggregating \$200,000.00, were demanded from said two defendants alone. However, said sum

is insignificant compared with the total demands of the plaintiff-appellee.

In the affidavit, filed in support of said motion, it is claimed that 15c per bushel is saved by the use of the invention monopolized by the Dunkley patent "over and above the old methods and machines open to use by the appellants." At ~~50~~⁴⁰ pounds to the bushel, said claim of savings amounts to \$6.00 per ton. In the February, 1917, issue of the "Western Canner and Packer" it is estimated that in 1916, the California pack of canned peaches amounted to 3,700,000 cases. A case contains approximately 50 pounds of peaches. Therefore, according to said estimate, just the California 1916 pack alone amounted to 185,000,000 pounds or 92,500 tons of canned peaches. As the lye process is generally used for peeling peaches in this State, as well as elsewhere, it is safe to estimate that at least 90,000 tons were so peeled in 1916. At \$6.00 per ton, the total claim of plaintiff-appellee would amount to \$540,000.00 for just one year's pack in only one State of the United States. That said amount is not an exaggeration of the claims of the plaintiff-appellee, is indicated by the fact that, in these suits against only a few of the total number of canners engaged in the business, the plaintiff, in the lower Court, demanded herein supersedeas bonds aggregating in amount, the sum of \$655,000.00.

In view of the foregoing, it is apparent that the total claims of the plaintiff-appellee, for the remain-

ing fourteen years of the life of the Dunkley patent, run into millions of dollars.

Said millions of dollars would, of course, have to be paid ultimately by the general public, if the plaintiff's claims are sustained. The importance of this litigation is, therefore, obvious and, by reason thereof, we feel justified in fully presenting at length all of our contentions.

It is to be noted that plaintiff-appellee's alleged right of recovery of said millions of dollars is based solely upon the oral testimony of three witnesses given thirteen years after the occurrence of the events testified to and uncorroborated by any documentary evidence which, on its face, proves anything relevant or material; that two of said witnesses, father and son, are highly interested in the results of the litigation and the other witness, a nineteen-year-old boy at the time of the occurrences testified to by him, is a former employee of the Dunkleys; that said oral testimony herein is contradicted by the former testimony of two of said witnesses given six years before the trial of this case; that said testimony is contradicted by the testimony of three witnesses called by the defendant-appellant and by documentary evidence produced by one of them; and that said testimony is disproved by its own self-destructive inconsistencies and contradictions and by its inherent improbabilities.

We respectfully submit that it would be impossible to find reported anywhere another case in which

a plaintiff's claim for such an immense sum, as is involved herein, was sustained by the character of proofs offered herein in behalf of plaintiff-appellee.

As said by Judge Cox in *Thayer v. Hart*, 20 Fed., 693:

"The evidence of prior invention is usually entirely within the control of the party asserting it, and so wide is the opportunity for deception, artifice, or mistake, that the authorities are almost unanimous in holding that it must be established by proof clear, positive and unequivocal. Nothing must be left to speculation or conjecture."

I.

ON AN APPEAL IN AN EQUITY SUIT, THE WHOLE CASE IS BEFORE THE COURT FOR ITS DECISION ON THE MERITS.

In the case of *Waterloo Min. Co. v. Doe et al.*, 82 Fed., 45, this Court, speaking through District Judge Knowles, Judges Gilbert and Bellinger concurring, said:

"It is further urged by appellees that this court is bound by the findings of facts of the circuit court, unless they are found to be clearly and palpably erroneous. On an appeal in an equity suit, the whole case is before the court, and it is bound to decide the same, so far as it is in condition to be decided, on its merits. Beach, Mod. Eq. Prac., p. 978; Ridings v. Johnson, 128 U. S., 212, 9 Sup. Ct. 72; Garsed v. Beall, 92 U. S., 684-695; Johnson v. Harmon, 94 U. S., 371. If a case

has been referred to a master, and he has made findings of fact, there ought to be exceptions to the same, if any party to the suit is dissatisfied therewith, and a ruling upon the same made by the chancellor. If this course is not adopted, these findings cannot be reviewed on appeal. It is to be observed, however, that the findings of fact by the circuit court are not without some weight in considering the merits of the case. *This case, therefore, is presented to this court upon its merits, and must be considered upon the evidence, with such aid as may be found in the findings of the circuit court.*"

In *Riding v. Johnson*, 128 U. S., 212, 218, the Supreme Court said:

"But, on an appeal in an equity suit, the *whole case* is before us, and we are bound to decide it so far as it is in a condition to be decided."

In *Johnson v. Harmon*, 94 U. S., 371, the Supreme Court said:

"It is the duty of the court of first instance to decide (as was done here) upon the whole case, pleadings, evidence, and verdict, giving to the latter so much effect as it is worth. An appeal from the decree must be decided in the same way, namely, upon the *whole case*, and cannot be made to turn on the correctness or incorrectness of the judge's rulings at the trial of the feigned issue."

In *Garsed v. Beall et al.*, 92 U. S., 684, 695, the Supreme Court said:

"Equity courts may decide both fact and law, but they may, if they see fit, refer doubtful ques-

tions of fact to a jury. Findings of the kind, however, are not conclusive, and, if not satisfactory, they may be set aside or overruled, but if the finding is satisfactory to the Chancellor, the practice is to regard it as the proper foundation for a decree. *Harding v. Handy*, 11 Wheat., 103. *Such findings are regarded as influential in an appellate court, but they are not conclusive. Goodyear v. Rubber Co.*, 2 Cliff., 365; *Brockett v. Brockett*, 3 How., 691; 2 *Dan. Chan. Prac.*, 4th Am. Ed., 1072. Consequently, counsel were allowed to review the whole evidence in the case, and the court has followed the course adopted by the counsel at the argument, and the result of the review of the evidence is that the court is clearly of the opinion that the findings of the jury were correct in all material respects, and that there is no error in the record."

In the case of *Alexander v. Redmond et al.*, 180 Fed., 82, the Circuit Court of Appeals for the Second Circuit, speaking through Circuit Judge Lacombe, said:

"This being an appeal in equity, the facts as well as the law are open for our consideration, as they would be even if the jury had rendered a verdict without direction, and the issues must be disposed of upon the record brought here from the circuit court. No reservation of a motion to reopen the case extends to this court. The circumstance that a jury was impaneled is immaterial. Appeal in equity brings the cause here for final disposition."

Opposing counsel contend that the long and well established rule of review, set forth in the foregoing

decisions, has been changed by the decision of the Supreme Court in the case of *Cecil F. Adamson v. David C. Gilliland*, reported in the United States Supreme Court Advance Opinions of February 15, 1917, at page 169. At page 41 of their brief, opposing counsel state their contention in the following language:

"We are very confident at this juncture that the law is settled by the United States Supreme Court, that a *finding of fact* determined in open court trial in a district court must be, to use the language of that court, '*treated as unassailable.*'"

Of course, said *Adamson v. Gilliland* decision does not establish any such radical and far-reaching innovation in the review of equity cases by an appellate court. If opposing counsel were correct in their contention, the right of appeal, in most equity cases would be of no value to the appellant; the appellate court would be limited to a mere review of matters of law. Furthermore, such suggested rule of procedure would be incompatible with the other well established rules controlling the review of an equity case by an appellate court. The appellate court is compelled to finally dispose of an equity suit and must consider, not only all the proofs considered by the lower court, but also all proofs improperly excluded by the lower court.

If the Supreme Court intended to revolutionize the practice on appeals in equity cases and intended

to limit an appellate court's powers of review therein to a mere consideration of alleged *errors of law*, it would have so expressed itself in no uncertain terms. Such a radical innovation, if intended, undoubtedly would have been announced in an opinion reviewing the long line of decisions to the contrary and giving elaborately considered reasons justifying such a revolutionary departure therefrom.

The said *Adamson v. Gilliland* decision is not susceptible of the interpretation placed upon it by opposing counsel. *In fact, in that very case, the Supreme Court follows the rule, laid down in the numerous authorities above referred to, and considers and reviews at length the evidence therein.* Certainly, if the Supreme Court intended to announce a new rule of procedure, it, contemporaneously with the announcement of such rule, would not ignore and violate it. The Supreme Court's course, in reviewing the evidence in the *Adamson* case, amounts to a re-affirmation of the well and long established rule announced by this Court in the case of *Waterloo Min. Co. v. Doe et al.*, *supra*: "*This case, therefore, is presented to this court upon its merits, and must be considered upon the evidence, with such aid as may be found in the findings of the circuit court.*"

That no such novel rule is announced or is intended to be announced in said *Adamson* case, is made absolutely certain by the Supreme Court specifically basing its decision therein upon its *review*

of the evidence. The opinion, in said case, ends with the following statement: "Upon these considerations and a review of the evidence we are of opinion that the decree must be reversed."

In its said opinion, the Supreme Court refers to a "*practical rule*" announced in the case of *Davis v. Schwartz*, 155 U. S., 631. It will be noted that said rule is referred to only as a "*practical*" rule. In other words, the Court was careful not to refer to such rule as a *rule of law* controlling and limiting the scope of an appellate court's review of a decision in an equity case. Said rule, when considered merely as a "*practical rule*" applicable to a consideration, by an appellate court, of the evidence in an equity suit, not referred to a master, as in the *Davis v. Schwartz* case, is merely the announcement of a common sense attitude that naturally would be assumed by any court under certain circumstances. For instance, in a case where two witnesses, for one side, testify to a certain state of facts and two or three witnesses, for the other side, testify to a different state of facts, and there is nothing inherently improbable and no self-destructive inconsistencies in the testimony of either set of witnesses, it would be but common sense for an appellate court to apply the so-called "*practical*" rule referred to by the Supreme Court. In other words, in an equity suit, *not* referred to a master *by consent*, the said "*practical*" rule is not a "*rule of law*," limiting and curtailing the powers of an appellate court, but

is merely the expression of a common sense rule or attitude applicable to a consideration of conflicting evidence of a particular character.

This Court is familiar with the case of *Davis v. Schwartz, supra*. In fact, the writer cited it in arguing the case of *Marshall & Stearns Co. v. Murphy Mfg. Co.*, 199 Fed., 772. In that case, *the whole case* was, *by consent of the parties*, referred to a master to determine the *whole case*. Of course, the lower court could not have made such a reference of the *whole case*, in the absence of the parties' consent. A court cannot delegate its judicial powers to another. In the *Davis v. Schwartz* case, the *whole case* was likewise referred, *by consent*, to a master. It was such *consent reference* that formed the basis of the Court's remarks therein and which are quoted in the *Adamson v. Gilliland* case. In the *Davis v. Schwartz* case, the Supreme Court says:

"The question of the conclusiveness of findings by a master in chancery under a *similar order* was directly passed upon in *Kimberly v. Arms*, 129 U. S., 512, in which *a distinction is drawn* between the findings of a master *under the usual order to take and report testimony*, and his findings when the case is referred to him *by consent of parties, as in this case*. While it was held that the court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet when the parties select and agree upon a special tribunal for the settlement of their controversy,

there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself, *where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the finding of a subordinate court.*"

The foregoing shows that the said rule, announced in the *Davis v. Schwartz* case, was specifically limited, in its application, to an equity suit referred, *by consent*, to a master to hear and determine the *whole* case. There is, however, no law that declares an appellate court, in an equity suit not so referred, "*shall act upon the finding of a subordinate court*"; and the Supreme Court certainly did not intend to announce any such law or rule in the *Adamson v. Gilliland* case, in which it does not treat the findings of the lower court as binding on it, but, on the contrary, *reviews the whole evidence* and specifically bases its decision therein *on such review*.

This Court, in the case of *Wilson & Willard Mfg. Co. v. Bole*, 227 Fed., 610, very recently announced the rule, applicable to its review of an equity suit, as follows:

"The fact that the trial court decreed in favor of the appellees on conflicting testimony is entitled to consideration; but if this court is convinced that the decree is erroneous, after giving due weight and consideration to the superior advantages possessed by the trial court, a reversal must follow."

Furthermore, there is *no conflict* in the evidence

herein in respect to the Vernon machine being a complete anticipation of the Dunkley patent. We shall hereafter show that such Vernon machine is proved an anticipation by uncontradicted proofs. *Plaintiff* called only one witness who ever saw the Vernon machine in operation and that witness, Dawson, confirms and corroborates the testimony given by defendant's numerous witnesses concerning the construction and mode of operation of the Vernon machine. Plaintiff refrained from asking Mr. R. I. Bentley any questions regarding the Vernon machine although his affidavit shows he was familiar with the operation thereof, and his description thereof, in his affidavit, confirms and corroborates the said testimony of defendant's witnesses and of *plaintiff's* witness Dawson.

Furthermore, the Dunkley testimony should not be deemed to raise a substantial conflict in the proofs. Said testimony is *discredited testimony*—discredited by the former contradictory testimony given by the Dunkleys in the Dunkley-Beekhuis interference proceeding *six years* prior to the trial of this case in the lower court. Said testimony is likewise overwhelmed by the opposing proofs; it is disproved by its own self-destructive inconsistencies and it is disproved by its inherent improbabilities.

As said in *Moulton v. Sanford, etc. Railroad Co.*, 99 Me., 508, 59 Atl., 1023:

"But a conflict of testimony cannot be said to arise simply because one witness testifies contrary

to another. If it was so held, hardly a verdict could ever be set aside. It would be difficult to imagine a case that had been dignified with the verdict of a jury that would not present some conflict of testimony. Besides, if such were the rule, it would only be necessary to secure the evidence of a witness, however false, to hold a verdict once obtained.

"This rule cannot be so construed. It means there must be substantial evidence in support of the verdict—*evidence that is reasonable and coherent, and so consistent with the circumstances and probabilities in the case as to raise a fair presumption of its truth when weighed against the opposing evidence. When it is overwhelmed by the opposing evidence, a verdict cannot stand. Roberts v. Boston & Maine R. R., 83 Me., 298, 22 Atl., 174.*"

In *Estate of Irvine*, 102 Cal., 606, it is said:

"This contemporaneous evidence on the part of Mrs. Smith is so directly at variance with her oral testimony upon the same subject given so many years later, and is so corroborative of the testimony on the part of the administrator, that we think her oral testimony did not create a *substantial* conflict with that given on the part of the administrator, and that the above finding of the court was contrary to the evidence."

That is the precise situation in the case at bar. Six years before this case was tried in the lower Court, the Dunkleys testified that the first Dunkley peach peeler, Exhibit No. 10, was made in 1903, at a time when William Bruner was at South Haven, and that *he even may have made it*. William Bruner

testified *herein* that said machine was, in fact, made in 1903, when he was at the South Haven factory of the Dunkley Company, but that Campbell made it. The Dunkleys testify *herein* that it was made in 1902, admittedly almost a year before Brunker first went to South Haven or entered the Dunkley Company's employ.

In view of the Irvine decision, *supra*, such *changed testimony* of the Dunkleys *herein* "did not create a substantial conflict" with that given by Brunker and Campbell.

Furthermore, some of the most important and vital findings of the lower Court are not supported by any of the evidence or proofs herein. We shall hereafter show that the only possible basis for said findings are the misrepresentations resorted to by opposing counsel in arguing this case in the lower Court.

In view of the foregoing considerations, we respectfully submit that this *whole case* is now before this Court for its decision on the merits.

II.

DUNKLEY INTERFERENCE RECORD.

In view of the questions raised by the discussion of the testimony given in behalf of Dunkley in the Dunkley-Beekhuis interference proceeding, we shall file, with the Clerk of this Court, a printed copy of the record on behalf of Dunkley in said interference. The said copy is one secured by us from the United

States Patent Office. Our authority for filing said record for the Court to consider the same, is found in the case of *Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co.*, 133 Fed., 167. In that case, the Court of Appeals for the First Circuit said:

"Inasmuch, however, as we must examine the prior decisions to a certain extent in reaching whatever conclusions we may reach, it is necessary that we should point out the principles which should guide us in doing so. How are the cases to be brought together for this purpose? An answer based on necessary rules of procedure seems clear. It is essential that the facts brought out in the earlier litigation should be proved in the pending cause independently and according to the ordinary rules of evidence, *and that thereupon the court in the pending cause should advise itself as best it may of what appeared to the courts making the prior decisions from the opinions rendered by them, or from an informal ascertainment otherwise of what was laid before them.* As this ascertainment is merely to inform the conscience of the court in the pending cause, and to enable it to follow the lines of reasoning and the conclusions of the tribunals rendering the earlier decisions, it involves only a gathering of the history thereof from any reliable source. *This may be done by the informal production of the records in the earlier cases, as well as by a perusal of the opinions of the courts. The court in the pending suit may accept the statements of counsel so far as they are not controverted, or, if controverted, so far as the court can, by informal methods, satisfy itself in regard thereto.*"

III.

MISREPRESENTATIONS RESORTED TO BY OPPOSING COUNSEL AND FORMING BASIS OF THEIR ARGUMENT IN LOWER COURT AND IN THIS COURT.

Our duty to this Court, to our clients and to our clients' witnesses, demands that we now perform a most disagreeable task. It is an exceedingly unpleasant and distasteful one, but we have no alternative. Plaintiff's case is based on misrepresentations and its presentation to this Court is based on misrepresentations. We shall now consider some of the misrepresentations indulged in by opposing counsel, both in this Court and in the lower Court. We shall hereafter consider the influence some of said misrepresentations obviously had on the lower Court's decision herein. As stated by us, in our opening brief, we are determined this Court shall not be misled by any misrepresentations.

Misrepresentation to effect that evidence in Dunkley v. Beekhuis Interference is same as in this case in respect to Dunkley building any peach peeling device or machine prior to Bruncker's term of employment in 1903.

In his argument, in the lower Court, Mr. Miller stated, as follows:

"Now, the evidence that was produced in that case (Beekhuis-Dunkley Interference) is the same

evidence that has been produced here, evidence as to the date of Mr. Dunkley's conception, the date of Mr. Dunkley's application or reduction to practice, the building of his machine, and his application for a patent, including this big machine over here, this model, which was made in the fall of 1902. There is a judicial determination by the Court of last resort upon those facts, and *the finding of facts in that matter shows that this model was made in the fall of 1902, but without the lye-tank; that in the spring of 1903, the lye-tank was bought, and that in the peach-peeling season of 1903, the lye-tank was coupled up with this machine, and that this machine was put to use in actual peeling of peaches in 1903 * * **" (R. 682).

"There is no difference between the testimony that was given in the interference and the testimony that was given here; *the testimony is exactly the same in both cases*, that is to say, that this machine, Exhibit 10, together with the complete tank making it a machine that was complete in 1903; the letter of Clark shows that; it shows that the tank was obtained there; *but the machine without the tank was in 1902, and the machine with the tank was in 1903, and that is what the record shows in the interference case*, and that is exactly what the record shows here in this case" (R. 692).

In our opening brief we referred to said statements as gross misrepresentations of the facts and challenged opposing counsel "to refer this Court to any testimony by any witness in said interference or any statement in any of the briefs filed therein by Messrs. Chap-
pell & Earl in Dunkley's behalf, even remotely suggesting or intimating that any part of said Dunk-

"ley machine was made, commenced, bought or used,
 "prior to July, 1903, or at any time other than
 "during the four months' period when William
 "Brunker was at South Haven in the employ of the
 "Dunkley Company."

The answer to our challenge is made at page 58 of the appellee's reply brief and is as follows:

"It is true that we there made the statement that the testimony in the interference case was the same as the testimony in the case at bar. *On its face this statement may appear to be too broad*, but it was merely a statement made in oral argument by counsel which was not excepted to at the time, *and which is not shown to have influenced the Court*. It is not unusual in the heat of a verbal debate during a hotly contested case for an attorney to *color* his statements *more vividly* than he would *in the seclusion of his office* when writing a brief, and a charitable view to take would be to attribute his course to *excessive* zeal. But to attribute it to a deliberate intent to deceive the Court, and to characterize it as being 'despicable and contemptible,' and used for the purpose of 'bolstering up a charge of false swearing made against honest men,' so far exceeds the bounds of propriety as to be inexcusable. Much latitude may be accorded to zeal and enthusiasm, but no justification can be made for a breach of decorum. We resent the charge with indignation, trusting that our long experience before this Court will justify the conclusion that there was no intent on our part to deceive the lower Court."

It is to be noted that opposing counsel says: "*On its face, this statement may appear to be too broad*

. . .” leaving it to this Court to surmise just how much “*too broad*” it was. If opposing counsel expected a “*charitable view*” to be taken of his conduct, he should have freely and frankly informed this Court that his statement was incorrect precisely *to the extent* charged by us in our opening brief. However, opposing counsel evidently believed that such a frank and full confession would weaken his client’s case too much and, therefore, instead of making amends, to the fullest extent, for the injury done by his misstatement, he is still attempting to have his client profit by it. Such a full and frank admission of the extent of the inaccuracy of his said statements would also prove the other counsel for appellee to be guilty of resorting to almost identically the same misrepresentation in his contribution to this same reply brief. On page 4 thereof, Mr. Chappell indulges in the following misrepresentation :

“The proofs in the Interference proceeding are not here. Defendants did not dare to offer them in their entirety, because the numerous witnesses there sworn *entirely support the dates that are fixed here*, as counsel for defendants-appellants very well knows.”

“Counsel for the defendants-appellants very well knows” that the foregoing statement is a gross misrepresentation of the facts and, by filing the Dunkley Interference record with the Clerk of this Court, said counsel is placing this Court in a position to likewise

know that said statement is a gross misrepresentation of the facts. Furthermore, said misrepresentation was resorted to "*in the seclusion*" of opposing counsel's office and is not, therefore, to be attributed to the "*heat of a verbal debate.*"

There is not, in said Dunkley Interference record, the remotest intimation by anyone that any peach peeling device or machine or part of any such device or machine or any model or part of a model, embodying the Dunkley invention, was made, bought or used prior to the period of William Bruncker's employment, in 1903, by the Dunkley Company. On the contrary, said record *affirmatively* shows, as follows:

1. The contention that Dunkley conceived the invention in August, 1902. (See Dunkley Preliminary Statement quoted at page 77 of our opening brief.)

2. The contention that he did not *even disclose his mental conception thereof* to anyone until September, 1902 (Dunkley Preliminary Statement).

3. *That no model of the machine was ever made* (Dunkley Preliminary Statement).

4. The contention that Dunkley, in September, 1902, made some sketches disclosing his invention but *that these had been lost* (R., pp. 485-489, and Preliminary Statement).

5. That the so-called model machine, Exhibit No.

10, was considered *by Dunkley* to be a "regular working machine" (R., 485-489).

6. That said machine, Exhibit No. 10, was made in 1903, at a time when Brunker was at the Dunkley South Haven factory (R., 485-489).

7. That, according to Melville Dunkley, *Brunker* or *Campbell may have made it* (Testimony quoted at p. 72 of our opening brief).

8. That, according to the witness Verhage, Campbell made the *wooden-frame* of Exhibit No. 10 in July, 1903 (Testimony of Verhage quoted at p. 74 of our opening brief. *This Verhage testimony conclusively disposes of the Dunkley "excuse" for changing their testimony. He says the "wooden frame" was made in 1903, thus corroborating Campbell, Brunker and Mapes, and the Dunkley interference testimony. The Dunkleys now say herein, six years later, that said identical wooden frame was made in 1902.*)

Said record *fails* to refer to or show or disclose anything regarding the following *alleged facts* referred to in Mr. Miller's statement *as being actually disclosed in said record*:

1. The *making*, at any time, of any lye-tank for said model machine, Exhibit No. 10.

2. The *purchase*, at any time, of any lye-tank for said model machine, Exhibit No. 10.

3. The *coupling-up*, with said model machine, Exhibit No. 10, at any time, of any lye-tank.

4. The *use* of any lye-tank, at any time, with said model machine, Exhibit No. 10.

Of course, the witnesses refer to the initial subjection of the peaches to a lye-solution, but said solution could have been heated, so far as their testimony indicates, just as Brunker said, in a wash boiler and the peaches dipped therein and then deposited in the model-machine to be therein *brushed* and sprayed. As Campbell and Brunker said, the model machine was never used commercially.

The testimony of Campbell and Brunker shows that no lye-tank was a part of or used with said model-machine, and the interference testimony of Dunkley, quoted in the record herein at pages 485 to 489, corroborates their testimony. When asked the *size* of said model-machine, Exhibit No. 10, the patentee Dunkley said:

"Q. 18. How large was it?

"A. In size or capacity?

"Q. 19. Both.

"A. Well, *it was a little over 5 or '6 feet long, about 3 feet wide* and had a capacity of from 100 bushels to 200 bushels of peaches per day" (R. 487).

Plaintiff's Exhibit No. 10 is the *wooden-frame* of said model machine and it was exhibited to this

Court at the time of the oral argument. *Said frame is precisely 5 feet and 8 7/8 inches long and 3 feet and 5/8 inches wide.* According to Dunkley's said measurements of said model machine, the same could not have comprised anything but the skin-removing means mounted on said frame. In other words, the length of the machine, as so stated by Dunkley, is sufficient only to embrace said *wooden-frame*, thus showing that there was no tank included as a part of the machine. The addition or presence of such a tank as a part of such machine would increase the length of the machine to ten or twelve feet at the very least. Verhage said such "*wooden-frame*" was made by Campbell in 1903.

In the interference proceeding, Melville Dunkley testified as follows:

"Q. 9. I call your attention to the counts in this interference, which were originally numbered 3, 4, 5 and 6, but now bear numbers 1, 2, 3 and 4, ask you to read the same over, and state if you understand the structure to which these counts refer.

"A. Yes, sir, I do.

"Q. 10. When did you *first become acquainted with such a structure*, and state the circumstances? Indicate both the time, as near as you are able, and the circumstance.

"A. I became acquainted with a similar structure *during the summer of 1903*, as we built a machine having those characteristics and used southern fruit in a trial" (Interference Record, p. 71).

The "*counts*," referred to in the above question 9, are set forth at page 485 of the record herein. It is to be noted that each of said counts merely and alone describes the "*brush-spray-pipe skin-removing means*" of the Dunkley machine. No lye-tank or "skin disintegrating means" is included in the *structure* described in any one of said counts. In answer to the question when he *first became acquainted* with the "*structure*" referred to in the counts, it is to be noted Melville Dunkley says: "*during the summer of 1903.*" Said "*structure*" was the only "*structure*" involved in the interference proceeding.

Notwithstanding the foregoing testimony and all the other interference testimony heretofore quoted by us and to the effect that said structure, to wit, the model Exhibit No. 10, was not built until 1903, opposing counsel, Mr. Chappell, has the audacity to indulge in the following remarks at page 4 of appellee's reply brief:

"They did not offer that record. They attempted a sort of *sharp-practice* by quizzing about an isolated portion here and another portion there, and they now wish to explain the very different things proven here from those which were proven in the Interference proceeding.

"The proofs in the Interference proceeding are not here. Defendants did not dare to offer them in their entirety, because the numerous witnesses there sworn *entirely support the dates that are fixed here, as counsel for defendants-appellants very well knows.*"

The Interference record is now on file with the Clerk of this Court. *The testimony therein conclusively proves that the two Dunkleys committed deliberate perjury in the case at bar.* Said record, however, proves more than this. It does not prove opposing counsel guilty of some "*sort of sharp practice*"; it merely proves them guilty of a "*sort of practice*" just the opposite. They apparently did not think we were in earnest when we said, in our opening brief, that we were determined this Court should not be misled by any misrepresentations.

Said Interference record was not offered in evidence because, *as a whole*, it could not be properly used to impeach the testimony of the two Dunkleys. It contains the testimony of other witnesses. *However, sufficient of the Dunkley interference testimony was read to them, when on the stand herein, to show the conflict and vital inconsistency between such former testimony and their testimony herein.* There is absolutely nothing in said interference record which tends, in any way, to explain or lessen such conflict. In fact, the whole of said interference record conclusively shows that the Dunkley testimony herein is false and that the model-machine, Exhibit No. 10, was not built until after Bruncker's arrival at South Haven in 1903, *just as Bruncker and Campbell said, when on the stand herein.*

If there was anything in the Interference record which even remotely suggested the building of the

model Exhibit No. 10, or any part thereof, before Brunker went to South Haven in 1903, opposing counsel would have gladly accepted the challenge, contained in our opening brief, and *quoted* it. The excuse offered for not accepting our challenge is given in the following language by Mr. Miller, at page 16 of appellee's reply brief:

"Another matter we venture to note is the copious reference in defendants' brief to matters dehors the record. *Purported* quotations from the proceedings in the Patent Office and the briefs filed therein, as well as other matters, are indulged in. Indeed, we are invited to follow the example and even 'challenged' to do so, and the Court is asked to note if the challenge is accepted. We pass this by with the remark that *we are arguing this case on the record which is before the Court, and shall not so far forget a counsel's duty as to depart from the canons of proper practice.*"

In view of the circumstances prompting us and compelling us to make said challenge, it is hardly conceivable that anyone, unless entirely devoid of a sense of humor, could have indulged in the foregoing answer to our challenge. The record before this Court shows that, in his argument in the lower Court, opposing counsel not only referred to what was disclosed in the Interference record, but grossly misrepresented what was disclosed therein. He was the *first one* to go outside the record herein. He was the one who *first* "*so forgot a counsel's duty as to depart from the canons of proper practice.*" As

stated at page 71, of our opening brief, *we went outside the record herein in order to answer opposing counsel's misstatements regarding the Interference record.* As opposing counsel's misrepresentation consisted principally of a statement of what was *not* disclosed in said record, the burden was on us to prove a *'negative*. We, therefore, challenged opposing counsel to *quote* any portion of said record which would support what we characterized as a gross misrepresentation on his part. His answer is that he cannot "*so far forget a counsel's duty as to depart from the canons of proper practice*" and go outside the record a *second time* to justify his *first* excursion therefrom into the realms of the imagination.

Misrepresentation to the effect that Brunner was asked to identify a machine and pointed out the wrong machine.

This misrepresentation was indulged in by opposing counsel at the time of the oral argument in this Court and, therefore, we shall, *as requested by them*, take a "charitable" view of the same and attribute it to the "*heat of a verbal debate.*" At that time, the writer denied that any such episode occurred. However, the Court apparently evinced such interest in the matter, that opposing counsel evidently thought it a misrepresentation well worth repeating "*in the seclusion of his office.*" Therefore, on page 64 of appel-

lee's reply brief, we find said misrepresentation expressed in the following language:

"When he (Brunker) *was asked* in Court to point out the machine referred to, *he pointed out the wrong machine*. At that time plaintiff's Exhibit 10 and another peach-peeling machine were on exhibition in Court, and on looking around the room his eye fell upon the wrong machine and he promptly pointed to that machine *as the one* which Stewart Campbell built in 1903 (R. 69)."

Page 69 of the record contains only testimony given by Melville Dunkley. Brunker's testimony commences at page 598 and ends on page 632. We, therefore, presume the reference to "R. 69" at the end of the above quotation is *merely* an error, *although it makes it more difficult for one to locate that portion of Brunker's testimony represented as supporting the quoted remarks*. However, as Brunker only pointed to one machine, during the course of his examination, there is no difficulty in identifying the only portion of testimony, in any way, relating to such an episode. Before quoting said testimony, we wish to state that, when Brunker was on the stand, there was located on the floor, in front of the witness chair, "Plaintiff's Exhibit No. 6" (R. 75), a model made for the purposes of the trial and illustrating the "*skin-removing means*" of the Dunkley invention. Said model was in this Court at the time of the oral argument. It consisted of a wooden frame having

mounted therein the endless carrier or belt *brush*, two rotating cylindrical *brushes* and the three perforated pipes; it also included the gears, pulleys, etc., for operating the brushes. In other words, said model illustrated the Dunkley "*skin-removing means*" and was, therefore, *substantially similar to the first Dunkley model machine*, the *wooden-frame* of which is in evidence as Exhibit No. 10. At the time Brunker was testifying, there was resting on the top of the frame of said Exhibit 6, "Plaintiff's Exhibit No. 4" (R. 74), a model of a part of one of the defendant's machines. This model embraced a perforated iron cylinder mounted in a wooden frame. Such a device is shown as part of the machine illustrated in the drawing at page 26 of the record.

Brunker was asked to describe the peach peeling machine made by Campbell when Brunker was at South Haven in 1903. He commenced describing said machine and very naturally pointed to the model of the Dunkley machine, Exhibit 6, as being *like* the machine made by Campbell, *at the same time*, referring to the *differences* between the two. Instead of identifying Model No. 6 as being the *actual machine* made by Campbell, *he did just the contrary* and pointed out some of the *differences* between it and Campbell's machine. His testimony reads as follows:

"(MR. WHITE)—Q. What kind of a machine did he afterwards build?

"A. He built a machine, *like that*, with a car-

rying belt to carry the peaches along and the brushes alongside were 3 feet long; they revolved and peeled the peaches that were carried through on that belt.

"Q. Have you ever been in this courtroom before?

"A. No.

"Q. What machine did you point to in giving your last answer?

"A. Well, I pointed to that; *it resembled that some*; only this was not on top when I saw it, this metal; you see we only put—we had a sheet of galvanized iron lying around the place and we simply bent it over to keep the water off of me when I was peeling the peaches; there was nothing like that on it" (R. 601).

The foregoing embraces the testimony upon which opposing counsel bases his statement or rather misstatement that Bruner "*was asked to point out the machine*" built by Campbell and "*he pointed out the wrong machine.*"

When Bruner, in the midst of describing a machine he had not seen for years, suddenly saw before him a machine *embodying substantially the same features* and spontaneously pointed to it *as like* the (not *as the*) one he was then mentally picturing and verbally describing, the writer thought his act of *spontaneously* pointing to said machine *so natural* that he wished to emphasize the matter and, therefore, asked the witness if he had ever been in the courtroom before, with the idea of showing and emphasizing the fact that the witness acted *spontaneously* in so point-

ing out Exhibit 6 as a machine "*like*" or "*resembling*" the machine built by Campbell.

That Brunker's act, in so referring to Exhibit 6 as being "*like*" and "*resembling some*" the machine built by Campbell, was a *most natural thing* for him to do is proved by a *precisely similar episode occurring during the examination of plaintiff's witness Fontana*.

Fontana, in February 1904, took charge of the California Fruit Cannery Association plant at Fresno. When he went there, at that time, he found one of the *enlarged* Vernon machines. Of course it was not in use and Fontana did not testify he ever saw it in use. However, he was asked to describe said Vernon machine and replied that it was "*very similar to what I see in front of me now*." What he saw in front of him, was the same model of the Dunkley machine referred to by Brunker and marked "Exhibit No. 6." His testimony is as follows:

"MR. CHAPPELL—Q. Please state what you found there as a peach peeling machine at that time?

"A. *Something very similar to what I see in front of me now.* (Model of Dunkley machine, Plaintiff's Exhibit No. 6.)

"Q. Will you please describe in your own language what it was?

"A. There was a conveying-belt where women would split the fruit, and the belt went into a scalding or grass-hopper, as we then called it, with a solution for peeling peaches, or to loosen the

skin; from there it dropped into two tanks of water, and it was conveyed from those two tanks into what we called a *brush machine*, which looked very much like the machine in front of me now." (Model of Dunkley machine, Plaintiff's Exhibit 6.)

"Q. That is a pair of brushes?

"A. A pair of brushes and a small belt to assist the peaches through these brushes.

"Q. What was the water supply to this machine, and how many pipes did it comprise?

"A. There were two pipes through the machine—there were either three or four brushes, there were two belts, and *there was a pipe, that is between each of those two brushes.*

"THE COURT—There was a double installation?

"A. There must have been a double installation, and then there were very small perforations in these pipes; the pipe must have been about $\frac{5}{8}$ ths or $\frac{3}{4}$ ths of an inch pipe" (R. 471).

The foregoing testimony of *plaintiff's* witness Fontana shows that the Vernon machine embodied every element of the Dunkley machine. Of course, Fontana did not see any "*sprays*" in the machine because he does not pretend to ever have been at the Fresno plant *when said machine was in operation*. However, he says the machine embodied the perforated pipes and it was from the perforations in such pipes that the water issued in the form of "*spray*" and played on the peaches traveling along beneath the pipes. *Plaintiff's* witness Dawson saw the Vernon machine in operation and he referred to the presence of the "*spray*" action therein (R. 634). Therefore, *plain-*

tiff's witnesses, Fontana and Dawson, proved that the Vernon machine was *a complete anticipation of the Dunkley patent*.

It is to be noted that *plaintiff's* witness, Fontana, when first asked to describe the Vernon machine was content to describe it as a machine "*very similar to what I see in front of me now,*" and what he saw in front of him was Plaintiff's Exhibit No. 6, a model made for the purpose of illustrating the Dunkley invention. In other words, the respective "*brush-spray-pipe skin-removing means*" of the two machines appeared to the witness *to be so identical in construction* that he thought his said reference to such Dunkley model before him was a sufficiently accurate description of the Vernon machine and, therefore, *a complete answer to the question*. Not only did he once refer to such identity between the two machines, but he repeated his remarks to that effect. Furthermore, his detailed description of the Vernon machine shows that it was substantially identical with the Dunkley machine.

The witness Bruner was not asked to identify "Plaintiff's Exhibit No. 10" as the *wooden-frame* of the model machine built by Campbell because we did not think it fair to him to request him to attempt any such identification. Said Exhibit 10 is the mere skeleton of the machine built by Campbell in September and October of 1903, and it naturally would be a most difficult task for one to say, in 1916, that the

pieces of wood and the fragments of iron attached thereto actually formed a part of the original brush-spray-pipe mechanism made by Campbell in 1903. Campbell was able to identify said "skeleton" because he made it and could, therefore, recognize his handiwork therein. However, Brunker did correctly describe the model machine made by Campbell and his description thereof shows he had a vivid mental picture of the same. It was the first and *only* machine of the kind he ever saw and naturally he was able to remember such a novel device. It is to be noted that Brunker's description thereof shows it was a "*single-line*" machine and *that no lye-tank was used therewith or formed a part thereof*. It is also to be noted that Brunker says it was the *only* machine of the kind, at South Haven while he was there. It is also to be noted that Brunker says no peaches were commercially peeled on such a machine while he was at South Haven. It is admitted that, prior to November 1, 1904, only two Dunkley peach-peeling machines were built. It is also admitted that the second Dunkley peach-peeling machine, designated as the *first Dunkley commercial machine*, was a "*three line*" machine. Therefore, there is no question about Brunker's testimony referring to the "*single-line*" model machine, *the first Dunkley machine built*. In other words, Brunker's testimony is *only applicable* to the Dunkley "*single-line*" model machine of which Exhibit No. 10 is the wooden frame. *There was no*

other peach-peeling machine which fits Bruncker's description of the machine built by Campbell in September and October of 1903. Furthermore, Bruncker's narrative of the events and circumstances leading up to the building of said one-line model machine conclusively demonstrates that said model was the first machine built and that no similar machine had theretofore been built by Dunkley.

Misrepresentation to effect that Campbell claimed to have invented all of the machines, except one, installed and used in the Dunkley cannery and for which Dunkley secured the ten patents offered in evidence.

At page 158 of our opening brief, we called attention to a similar misrepresentation indulged in by Mr. Miller at the oral argument in the lower Court. However, in the briefs filed by them in this Court, both opposing counsel indulge in even grosser misrepresentations of the same nature.

At page 34 of the "Brief of Appellee," Mr. Chapell says:

"Mr. Campbell, on cross-examination, confessed (?) to being the inventor of all the structures which had been patented in Dunkley's name, although he had never had any experience whatsoever in the canning business up to that time and Dunkley had been at work at it all his life."

In the first place, it does not appear in the record that Dunkley had been in the canning business all his life previous to Campbell's employment. He says he

"started canning in the late 80's" (R. 477). Although it does not appear of record, our information is to the effect that, previous to that time, he was a house and fence painter and first got into the canning business through his sister-in-law, Miss Wing, a witness for him in the Interference proceeding and who first started the canning business as a small venture of her own. However, the matter is of no moment. It is to be noted, however, that, in addition to S. J. Dunkley, his sister-in-law Miss Wing and his son Melville, there were only two other witnesses called by Dunkley in the Interference, and both of them were, at one time, his employees.

At page 61 of the "Reply Brief of Appellee," Mr. Miller states:

"Not only did he (Campbell) claim to have devised and invented the peach peeling machine for which Mr. Dunkley secured a patent, but he also made a similar claim in respect of all the machines, except one, installed and used in the Dunkley cannery and for which Mr. Dunkley secured the ten patents which were offered in evidence. He claims to have invented and designed all of these machines out of his own head."

The foregoing was written after opposing counsel received our opening brief in which we called his attention to his similar misstatement, in the lower Court, of Campbell's testimony. However, opposing counsel seem determined to discredit Campbell even at the risk of discrediting themselves. In our opening brief,

we indicated the influence such a similar misrepresentation of Campbell's testimony had on the lower Court. Opposing counsel, therefore, apparently think it possible to also prejudice this Court against Campbell by a repetition of the same misrepresentation. Of course, if the said statements of opposing counsel were true, such preposterous claims, on the part of Campbell, would very naturally discredit him as a witness. *That is the reason why said misrepresentation is resorted to by opposing counsel.*

With the exception of the Dunkley patent in suit, all of the Dunkley patents, offered in evidence, were fastened together and marked "Plaintiff's Exhibit 9, Dunkley Canning Patents" (R. 477).

The following list includes all of said patents, together with the number of each, the date of application of each, the date of issuance of each, and the title of the invention disclosed in each one:

No.	Applied for		Issued		Invention
610,897	November	2, 1897	September	20, 1898	Fruit Jar or Can
673,048	March	30, 1900	April	30, 1901	Jar
721,166	March	13, 1901	February	24, 1903	Jar
35,098	May	20, 1901	September	17, 1901	Design for a Basket-Cover
724,170	May	20, 1901	March	31, 1903	Fruit Basket
779,537	May	12, 1902	January	10, 1905	Canning Machine or Apparatus
805,844	May	12, 1902	November	28, 1905	Automatic Processing or Cooking and Cooling Machine
794,598	November	29, 1904	July	11, 1905	Peach Splitting and Pitting Machine
974,759	November	29, 1904	November	1, 1910	Cherry-Pitting Machine
1,104,175	November	29, 1904	July	21, 1914	Machine for Peeling Peaches and Other Fruit
805,845	December	1, 1904	November	28, 1905	Machine or Apparatus for Automatically Processing or Cooking and Cooling Canned Food
921,523	February	27, 1905	May	11, 1909	Peach Splitting and Pitting Machine

In the first place it is to be noted that there are twelve of said Dunkley patents. Only *seven* of them are for "*machines*." Three of them are for "*jars*" and two for "*baskets*." Therefore, Mr. Miller's statement regarding the number of Dunkley patents for "*machines*" is incorrect. There are not "*ten*" Dunkley "*machine*" patents as stated by him. Campbell said nothing about inventing any fruit jars or baskets, and the patents therefor were applied for long before Campbell entered the Dunkley Company's employ in 1902.

In the second place, it is to be noted that only one of said patents was exhibited to Campbell. Opposing counsel examined him concerning patent No. 805,844 of November 28, 1905, for "Automatic Processing or Cooking and Cooling Machine." *Campbell not only did not claim to be the inventor of said machine but stated no such machine was at the Dunkley factory while he was there.* He testified as follows regarding said patent:

"Q. Will you look at that patent a little further and see whether you recognize it as showing any cooker that you saw at the plant at South Haven or any parts of it; I refer to the Dunkley plant.

"A. The only parts in this that look anything like it at all—of course it had a sprocket and chain for the carrying of the can through the water; they have a similar bracket on the chain; but otherwise it did not look anything like it, not anything like it here when I was there; there

was an open wooden cooker; that is closed" (R. 597).

The statement that Campbell claimed to have invented any of the other six machines respectively disclosed in the remaining six Dunkley patents, with the exception of the peach-peeler patent in suit, can only be based upon the similarity of the *title* given to each of said machines in the patent therefor and the *name* given by Campbell to any machine claimed by him as his invention.

The first *machine* patent on the list is No. 779,537 for a "Canning Machine or Apparatus." Regarding such a canning machine, Campbell testified as follows:

"Q. Did you have anything to do with the installation of the automatic canning machine?

"A. I had something to do with setting it up there.

"Q. Were there any friction gears to that, that you remember?

"A. I don't rememebr of any; *I don't think I had anything to do much with the construction, any more than placing counter shafts for them and setting the machines in place; the operation of them and so forth, and the like, I did not have anything to do with*" (R. 592).

The foregoing shows Campbell did not claim to have invented or to have even built the canning machine referred to. It is, therefore, most probable that said canning machine is the one covered by said patent No. 777,537. The application date of same, to

wit: May 12, 1902, confirms the foregoing. This disposes of patent No. 1 on the list.

The second patent in the list is No. 805,844 of November 28, 1905, for "Automatic Processing or Cooking and Cooling Machine." This is the patent exhibited to Campbell and already discussed. He did not recognize the device shown therein as "*anything-like*" any device at the Dunkley Company's plant (R. 597). This disposes of patent No. 2 on the list.

The third "machine" patent on the list is No. 794,598 of July 11, 1905, for "Peach Splitting and Pitting Machine." The seventh and last patent in the list is No. 921,523 of May 11, 1909, for "Peach Splitting and Pitting Machine." We shall discuss these two patents together because they are for the same kind of a machine, to wit: a peach-pitter.

It is admitted Campbell was actually employed to invent and build a peach-pitter. As stated by Melville Dunkley:

"A. He (Campbell) was employed primarily to develop the syruing machine and this *peach-pitter*, of which he had given some idea that he could build a machine capable of pitting peaches, *he was known as more or less of a genius* and was a brother of a family friend" (R. 457).

The building of said "syruing machine" and of said "peach-pitters" by Campbell is admitted by Dunkley (R. 456). Therefore, Campbell's claim to

having invented and built a peach-pitter is not disputed by the Dunkleys. It is admitted.

Furthermore, Campbell does not claim to have invented certain other peach-pitters taken to the South Haven plant. On this point he says:

"XQ. Did you ever see any pitting machine that Mr. Dunkley had produced?

"A. I did; I don't know whether Mr. Dunkley produced it; I saw one he brought there from the Kalamazoo plant while I was constructing the apparatus in South Haven.

"XQ. *You did not have anything to do with that construction?*

"A. *I did not.*

"XQ. When did you see that work?

"A. I saw two or three peaches run through it; two or three I say, I don't know how many; I saw a few run through one of the machines; I understood he had several; I think I saw two machines.

"THE COURT—Q. Pitters?

"A. Yes, both pitters.

"XQ. When did you see these?

"A. In 1904, while I was setting up this apparatus, this peach peeling line in 1904, along in July or August, somewhere along in 1904" (R. 567).

The foregoing shows that Campbell admittedly invented a "peach-pitter," and also that probably Dunkley invented another type of "peach-pitter." If the "peach-pitter," *admittedly invented by Campbell*, is disclosed in one of said Dunkley peach-pitter patents, above referred to, then Campbell certainly claimed he

was the inventor of the same and his said claim is admitted by the Dunkleys.

Opposing counsel, therefore, may be correct in stating Campbell claimed to be the inventor of *an invention* disclosed in one of said Dunkley peach-pitter patents. Of course, Campbell was not shown either of said peach-pitter patents and did not identify the device disclosed in either as *the "peach-pitter"* invented by him and, according to the Dunkley testimony, admittedly invented by him.

However, as Campbell admittedly invented one type of "peach-pitter" and as Campbell stated another type of "peach-pitter" had been brought to South Haven by Dunkley, it is most probable that one of said Dunkley peach-pitter patents discloses Campbell's invention and the other discloses Dunkley's invention. Certainly Dunkley's course in getting a patent on the peach-peeling machine invented by Campbell shows he was perfectly capable of also securing a patent on the "peach-pitter" *admittedly* invented by Campbell. It is to be noted said patents were respectively applied for on November 29, 1904, and on February 27, 1905. Campbell left the Dunkley Company's employ on September 3, 1904 (R. 542). The foregoing disposes of patents Nos. 3 and 7 on the list.

Patent No. 4 on the list is No. 974,759 of November 1, 1910, for "Cherry Pitting Machine."

Regarding the cherry-pitting machine, Campbell said:

"A. No. What little improvement I made on the cherry-pitters was done at South Haven; the early improvement on the feed, the clearance of them" (R. 574).

The foregoing shows Campbell did not claim to be the inventor of such cherry-pitter. He distinctly says he only made a *little improvement* in the feeding mechanism and that evidently had to do only with a matter of "clearance" of some part of the device. This disposes of No. 4 on the list.

Patent No. 5 on the list is No. 1,104,175 of July 21, 1914, for "Machine for Peeling Peaches and other Fruit." This patent is the one in suit. The circumstances leading up to the building by Campbell, in September and October of 1903, of the first model machine embodying the "*skin-removing means*" disclosed in this patent, have already been discussed.

Patent No. 6 on the list is No. 805,845 of November 28, 1905, for "Machine or Apparatus for Automatically Processing or Cooking and Cooling Canned Food."

Campbell stated that he built a "cooker," but there is nothing to indicate that the "cooker" referred to by him is the "Machine or Apparatus for Automatically Processing or Cooking and Cooling Canned Food" disclosed in said patent. When shown the Dunkley patent No. 805,844 for a similar apparatus,

Campbell said no apparatus like that shown in the patent was at the Dunkley plant. Evidently said patent was a mere "paper patent" and did not disclose any machine ever actually built. Therefore, if shown said other patent No. 805,845, Campbell possibly might have also failed to recognize the apparatus disclosed therein. Certainly, the "cooker" built by Campbell must have been a very simple arrangement, according to his meager description thereof. In any event, Campbell did not identify the apparatus disclosed in said patent No. 805,845, as his invention and there is nothing in the record to show that said "apparatus" is the "cooker" referred to by Campbell. That he worked on a cooker is not denied. Melville Dunkley said:

"Q. Mr. Campbell also worked on the cookers during the years 1902 and 3 did he?

"A. As a workman he might have worked on any of those different things" (R. 456).

The foregoing disposes of Patent No. 6 on the list. Patent No. 7 on the list has been discussed.

In view of the foregoing, it appears that there are only *seven* Dunkley "machine" patents and that Campbell's testimony *affirmatively* shows he did not claim to be the inventor of the "canning machine" mentioned in the first one; or of the cooking apparatus mentioned in the second one; or of the "cherry-pitter" mentioned in the fourth one; or of the peach-pitter mentioned either in the third one or in the

seventh one, he having claimed to be the inventor of only one peach-pitter.

If the "peach-pitter" disclosed in either of said Dunkley peach-pitter patents is the same as the one built by Campbell, then admittedly Dunkley obtained such patent for Campbell's invention because the Dunkleys admit Campbell invented the machine built by him.

The record does not show Campbell claimed to be the inventor of the apparatus mentioned in the sixth one of said machine patents.

Notwithstanding the foregoing facts, opposing counsel, in order to discredit Campbell, represent to this Court that:

"Not only did he claim to have devised and invented the peach peeling machine for which Mr. Dunkley secured a patent, but he also made a similar claim in respect of all the machines, except one, installed and used in the Dunkley cannery and for which Mr. Dunkley secured the ten patents which were offered in evidence. He claims to have invented and designed all of these machines out of his own head."

Having resorted to the foregoing misrepresentation as a basis and foundation for his attack on Campbell, opposing counsel, at page 63 of the "Reply Brief of Appellee", indulges in the following vituperation:

"We sum up Mr. Campbell's character by saying that in our opinion he is a soured, disgruntled, half-demented individual having a personal grudge

against Mr. Dunkley and giving his testimony for money."

We respectfully submit that Campbell is not the one discredited by such an attack based upon a misrepresentation of his testimony. Furthermore, if opposing counsel is sincere in intimating Campbell gave false testimony "*for money*" he should second our request that this Court recommend that the Department of Justice investigate the perjury committed in this case. Certainly perjury has been committed on one side or the other, and the guilty parties, whoever they are, should be punished.

Regarding the matter in *dispute* in the Dunkley-Beekhuis Interference, opposing counsel, at page 48 of the "Reply Brief of Appellee," state:

"It will be seen from the foregoing that the issue of priority of invention was involved in the interference and that 'all the tribunals of the Patent Office' decided that issue in Dunkley's favor. This demonstrates the error of our adversaries when they say that such an issue was not involved in the interference. The sum and substance of the interference matter is that Beekhuis was defeated on the question of fact as to priority of invention and then resorted to the technical expedient of contending that, although Dunkley was the prior inventor of the peeling jets, he was disentitled to make the claims because of an insufficient disclosure thereof in his original specification. This was the last resort of a badly defeated litigant, which ultimately went the way of the other issue."

The foregoing is merely another example of opposing counsel's reckless disregard for accuracy of statement.

By reference to page 6 of the Dunkley Interference Record, on file with the Clerk of this Court, it will be seen that, *prior to the taking of any testimony* in said interference, Beekhuis, in October, 1909, moved to dissolve the interference "*on the ground that the party Dunkley has no right to make any of the claims constituting the issues of the interference.*"

It, therefore, appears that the "*first resort*" of Beekhuis was the contention that Dunkley was not entitled to make the claims in issue in the interference. It, therefore, appears that opposing counsel is incorrect in stating, regarding such contention, that: "*This was the last resort of a badly defeated litigant, which ultimately went the way of the other issue.*" Said statement is purely imaginary. No testimony was taken in said interference until 1910 and, at the time of making said motion to dissolve on said ground Beekhuis was not "a badly defeated litigant."

After the taking of the testimony in said Interference, Beekhuis consistently contended, throughout all of the tribunals, that:

1. Dunkley was not entitled to make claims calling for "peeling jets" because of an insufficient disclosure in his application, as filed, of any such "peeling jets," *within the peculiar meaning given that expression by Beekhuis.*

2. That the brush-spray machines built by Dunkley, to wit: the first one-line model machine and the later three-line commercial machine, did not embody any such "*peeling-jets*."

As stated at page 26 of our opening brief, Beekhuis did not dispute or attack Dunkley's story of having built his first one-line model machine in 1903 and of having later built the three-line machine. Beekhuis merely contended that, in said machines, the "*brushes*" did the peeling and that the "*sprays*" therein were not "*peeling jets*." Therefore, the tribunals of the Patent Office and the Court of Appeals for the District of Columbia, were not required to pass on any *dispute* as to whether or not, in July, 1903, Dunkley made his first one-line model machine. The only "dispute" or real question in issue was whether or not said model embodied "*peeling jets*." That Beekhuis did not *dispute* the building of Dunkley's first machine at the time stated by him, is shown by the statement of Messrs. Chappell and Earl in their brief filed before the Commissioner of Patents, as follows:

"First, that Dunkley had produced *his machine* long before Beekhuis' conception. That has already been decided by the Examiner-of-Interferences and by the full membership of the Board of Examiners-in-Chief. *In fact it could not be decided otherwise without completely overruling the undisputed testimony.*"

In our opening brief, we accurately and correctly

stated the precise questions passed on in the said interference. At page 26 of said brief, we said:

"In other words, Beekhuis' attorneys, throughout the interference proceeding, assumed the story of Dunkley to be true in regard to his conceiving and making a '*brush machine*' but they contended that in such '*brush machine*' the water spray was not *the* means for removing the disintegrated skin or peel. In that regard, it is to be noted that the Court of Appeals for the District of Columbia expressly decided that, in the Dunkley machine, the water-spray or jets were not *the* means or *only* means of removing the skin, *but that the same merely cooperated with the brushes in performing such function.*"

Opposing counsel, by saying "*priority of invention was in dispute*" in said interference evidently wishes to convey the impression that Dunkley's story of having built his machines *at the times stated*, was disputed by Beekhuis and, therefore, the decision of the Court of Appeals for the District of Columbia is entitled to weight in the determination, by this Court, of the question of the dates of building said machines. Of course, priority of invention is involved in every such interference proceeding. The purpose of an interference proceeding is to determine who is the prior inventor. However, the determination of the issue of priority does not necessarily involve as a matter in dispute, the *date of building* of his first machine by one of the parties to the interference. The building of said machine at the date specified

may not be disputed even though, as in the Dunkley-Beekhuis interference, the opposing party may dispute the proposition that such machine, *admittedly built at such date*, embodies the invention described in the counts of the interference.

In view of the foregoing, the various decisions in the Dunkley-Beekhuis Interference are of no weight in determining the *date* when Dunkley's first *one-line* model machine was made. The *alleged date*, of the building of such machine, was not disputed or attacked by Beekhuis.

However, the decision of the Court of Appeals for the District of Columbia in said interference is absolutely controlling in respect to the *proper construction* to be placed upon the Dunkley "peeling-jet" claims in issue in the case at bar. Those claims were allowed to remain in the Dunkley application upon the expressed understanding that the "*spray*" in the Dunkley machine was *not* to be considered *the* "peeling-means" but was to be considered as merely co-operating with the action of the "*brushes*" in *brushing* or, as opposing counsel express it, in *scrubbing* the fruit, for the purpose of removing the dis-integrated skin. As that Court said:

"But let it be conceded that Dunkley was not fully aware of the effective action of the jets of water and *relied chiefly upon the action of the brushes to remove the skin*; * * *. The counts of the issue are satisfied by a construction in which peeling water jets *enter into the operation of re-*

moving the skins whether they be exclusively employed to remove the skins or not. *And in neither machine as described and constructed are the water jets shown to be the exclusive means of peeling."*

As heretofore stated, that Court treated the expression "water-spray," as used in Dunkley's application as filed, to be the equivalent of the expression "water-jets" as used in the Beekhuis patent.

At page 184 of our opening brief, we drew attention to the fact that the Vernon patent was issued for a "*process*" and not for any "*machine*." Due to said fact, the apparatus or machine, adapted for use in carrying out the process, is not therein described in detail and is merely indicated in the drawings without any attempt to show the details thereof.

However, for the purposes of opposing counsel's argument, it was apparently necessary to have the Vernon patent *be* for a "*machine*" and therefore, it *is* for a "*machine*" according to his statement at page 75 of his reply brief. He there states:

"After designing and constructing said *machine* he (Vernon) immediately proceeded to apply for a patent *thereon*."

Of course, the foregoing misrepresentation is of little importance, but *many little misrepresentations make a mighty misleading case*. And the briefs filed by opposing counsel simply abound in misrepresentations, both big and little. Many of these will be considered in the succeeding chapters hereof.

IV.

VERNON MACHINE PROVED AN ANTICIPATION BY
UNCONTRADICTED TESTIMONY.

The following list includes all the witnesses who testified regarding the Vernon machine:

Plaintiff's Witnesses.

Mark E. Fontana	Record page 470
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T. B. Dawson	" " 632
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Defendants' Witnesses.

H. G. Baker	" " 100
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R. B. Way	" " 124
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J. B. Cobbey	" " 146
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S. R. Combs	" " 170
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Newton Lushbaugh	" " 181
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John W. Hickey	" " 197
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E. H. Kennedy	" " 393
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Edward F. Lambert	" " 412
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In view of plaintiff's failure to call, as a witness, Robert I. Bentley, General Manager of the California Fruit Canners Association, his affidavit, regarding the Vernon machine, should be considered, under authority of *American Bell Tel. Co. v. National Tel. Mfg. Co.*, 190 Fed. 1018, cited in our opening brief.

Plaintiff's witness, Fontana, never saw the Vernon machine *in actual operation* at the Fresno plant of the California Fruit Canners Association, but he did see such machine at times other than during a peach

season. Regarding said Vernon machine, Fontana testified:

"MR. CHAPPELL—Q. Please state what you found there as a peach-peeling machine at that time?

"A. *Something very similar to what I see in front of me now.* (NOTE. Plaintiff's Exhibit No. 6, Model of Dunkley "brush-spray-pipe skin-removing means" was in front of witness and was the device referred to by him.)

"Q. Will you please describe in your own language what it was?

"A. There was a conveying belt where women would split the fruit and the belt went into a scalding or *grass-hopper*, as we then called it, with a solution for peeling peaches, or to loosen the skin; from there it dropped into two tanks of water, and it was conveyed from those two tanks into what we called a brush-machine, *which looked very much like the machine in front of me now.* (Second reference to model of Dunkley machine.)

"Q. That is a pair of brushes?

"A. A pair of brushes, and a small belt to assist the peaches through those brushes.

"Q. What was the water supply to this machine, and how many pipes did it comprise?

"A. There were two pipes through the machine—there were either three or four brushes, there were *two belts*, and there was a *pipe*, that is *between each of those two brushes.* (NOTE. This Vernon machine, one of the enlarged ones, being a *two-line* machine having two carrier belts.)

"THE COURT—There was a double installation?

"A. There must have been a double installation, and there were very small perforations in these pipes; the pipe must have been about $\frac{5}{8}$ ths or $\frac{3}{4}$ ths of an inch pipe" (R. 471).

The foregoing shows that said Vernon machine embodied *every mechanical element* of the Dunkley machine. The scalding or "*grasshopper*" constituted the "*skin disintegrating means*" and, as said by the witness, the peaches were conveyed through the solution therein. The witness also says, the "*skin-removing means*" *was like the model of the Dunkley machine*, that is, said means consisted of a carrier belt for conveying the peaches between two rotating brush rolls and *under a perforated water pipe* between said brush rolls.

At this point we ask:

What is there said, in the Dunkley patent, which, in any material way, or in any material particular, differentiates said Vernon structure from the Dunkley machine, therein described?

Absolutely nothing.

Plaintiff's witness Dawson, ever since 1899, has been the Assistant General Superintendent of the California Fruit Cannery Association. He was the *only* witness called by plaintiff who ever saw the Vernon machine in operation at the Fresno plant of said association. Regarding said machine, so used at Fresno, Dawson said:

"Q. Who installed the machine there, if you know?

"A. At Fresno, Mr. Vernon, in 1902.

* * *

"Q. What became of the machine there installed?

"A. We used it I think *two years*, I don't know what became of it eventually" (R. 633).

Regarding the presence of the "*spray*" action in said machine, Dawson said:

"* * * the brushes had *sprays of water* playing on them" (R. 634).

Mr. R. I. Bentley, General Manager of the California Fruit Cannery Association, stated, in his affidavit regarding said Vernon machine as used in 1902 at Fresno, as follows:

"The machine was provided with a conveyor for conveying the peaches from an alkaline bath onto the endless carrier and thence by means of the endless conveyor carried forward between the brushes. As the peaches progressed through the machine, and between the brushes, they were directly subjected to the *jets of water* issuing from the perforations in the pipe under water main pressure and were also turned and moved by the brushes, the brushes and *water-jets* together serving to remove the skin which had been previously treated to the alkaline bath" (R. 217).

As there is no question raised as to the presence of the "grass-hopper" or lye-tank, in said Vernon machine, we shall refer only to the testimony relating to the "*brush-spray-pipe skin-removing means*" in the Vernon machine *as the same was used at Fresno in 1902*.

H. G. Baker testified as follows:

"Q. What kind of a machine was that?

"A. It was a machine built along the lines of this last patent, having two brushes and a belt through the center of it to convey fruit through it, and a *spray-pipe* above to direct water onto it, and operated by power (R. 103).

"Q. Now, you say you were called up there to see if you could give this machine more capacity? Please explain what you meant by that and what if anything you did?

"A. The capacity simply meant that they *would get more fruit through the machine in a given time*; what I did to accomplish that end was two or three things. Do you wish me to tell what these things were?

"Q. Yes.

"A. This belt conveyor could be adjusted up or down as regards axis of the brushes, and by *raising that belt-conveyor it brought the fruit so high on the brushes, that they did not act so much upon the fruit*, and, therefore, would not retard the progress of the fruit through the machine so much, and more fruit would go through on that account; by putting the brushes *a little wider apart* more fruit could pass through because they *would act less* upon it.

"Q. Now in that washer that was so installed——

"A. Then one other thing we did; when that machine was sent up there from the shop the brushes rotated in opposite directions, both inward and downward on the conveyor, and I shifted one of the axis on the front end of the machine so that they *both revolved in the same direction*, and that also *turned the fruit and let it go through much faster*" (R. 106).

It will be noted the foregoing changes, made within a few days after the first installation of the machine

not positive which, and it was perforated on the under side, and that made the *spray of water* which washed the peeling from the peach as the peach passed through between the brushes" (R. 127).

Regarding the substitution of an iron pipe for such tin pipe, and the installation of a pump about three weeks after the machine was first used, Way said:

"Q. How did they come to put in a larger pipe?

"A. Well, the larger pipe was put in there at the same time that the new lead was put in, to correspond with more water.

"MR. LYON—You say a new lead was put in, what do you mean by that exactly?

"A. The supply pipe to furnish the *spray*.

"Q. What means, if any, did you have there for supplying the pressure after that, to this machine?

"A. We changed it in, say, probably two or three weeks after we started, and when we put this iron in, *we connected a pump to the main*.

"Q. What was the purpose of that pump?

"A. *For pressure, an even amount of water*" (R. 130).

Plaintiff's own witness Fontana corroborates the statement that said pump was installed. He says:

"Q. Did you find any pump there when you went there?

"A. Yes.

"THE COURT—Q. Attached to the line?

"A. Attached to the line, yes" (R. 473).

The witness Newton Lushbaugh testified as follows:

"A. In the season of 1902, they were brushes

I should judge close to 4 feet long, possibly somewhere in the neighborhood of a 6-inch brush; that is, the diameter of the brush was 6 inches, placed on a slight incline with the peaches or fruit coming to the brushes at the highest point, and with a belt, an endless belt arranged directly between the brushes and below the center to carry the peaches on through until they were discharged from that machine; *and also over the belt and between the brushes*, I could not say how high above the brushes positively, *there was a pipe*; at first the pipe was made of galvanized iron or tin; I don't exactly remember which, but later we had occasion to change this and made it out of common gas pipe, *and this pipe was perforated with three rows of holes*; one row of holes directed down and the others possibly at an angle like that (illustrating); *there was water forced through that pipe playing on the brushes and on the fruit.*

* * *

"MR. LYON—Q. Do you know to what extent that machine was used that season?

"A. *We used it on I think practically the entire output of the season.*

"Q. In what form were the peaches put through this apparatus and process?

"A. *At first we experimented with that, that is, putting the peaches through whole; that was only the start; after that the peaches were cut in half and pitted before they went into the machine*" (R. 182).

The witness Hickey said:

"A. * * * and this little elevator from this trough carried them up and dropped them into a kind of apron or chute that slid them right down on these brushes, the brushes revolved around and they passed through that; there was a little belt

that run between the revolving brushes that helped carry the peaches through so as to keep them turned and clean the peaches; *over these brushes we had a pipe, perforated pipe, spraying water over these brushes and peaches to clean them*
* * *” (R. 201).

The witness Lambert, *unlike* the foregoing witnesses, had nothing to do with the construction or operation of the Vernon machine, he having been the warehouse man at the plant. He did not attempt to give any detailed description of the machine, but simply said:

“A. I remember the peaches being carried on a belt through a tank of some sort, of chemical perhaps; then through brushes in which *there was water coming down as they passed along*” (R. 412).

In view of the fact that plaintiff's own witness corroborates all of defendants' witnesses in respect to said 1902 Vernon machine comprising a lye-tank or “grass-hopper” and a “*brush-spray-pipe skin-removing means*” consisting of two revolving brushes, a belt for carrying the peaches between them and a perforated *spray-pipe*, from the perforations of which issued water, in the form of spray, that played on the peaches, we respectfully submit there can be no doubt as to the said machine being a *complete anticipation* of the Dunkley patent.

We also wish to direct the Court's attention to the fact that *plaintiff was in a much better position than defendant* to prove any fact pertaining to said Vernon

machine. It was used in the plant of a company that was, for all practical purposes, *a party plaintiff in this action*, because, as Mr. Bentley said, the interests of the California Fruit Cannery Association and of plaintiff were, so far as this litigation is concerned, *the same*. Therefore, if the testimony of defendant's witnesses was not true, plaintiff could have produced innumerable witnesses to contradict the same, as it had the backing of the California Fruit Cannery Association, and, therefore, the backing of all the officers and employees of that company.

At this point, it will be of interest to note what the Patent Office Examiner-of-Interferences said regarding the *actual Dunkley machine or part thereof* offered in evidence by Dunkley in the Dunkley-Beekhuis interference. The opinion of said Examiner appears at the end of our opening brief, and in it occurs the following statement:

"A consideration of the machine or portion of a machine offered in evidence serves only to increase the doubts as to whether Dunkley's device would operate as it is now claimed it operates. *All of the brushes are composed of comparatively stiff fibre and the spray pipes are provided with small openings of about the size of an ordinary pin, these openings being spaced about an inch and a half apart along the length of the pipes. As previously stated, the rotary brushes are about six feet in length and these brushes are designed to act on the fruit as it is carried along by the conveyor brush. These brushes, it is now contended, serve principally to rotate the fruit and that the*

jets perform the work of peeling the same. But it seems unreasonable to suppose that the brushes in Dunkley's machine were designed primarily for the purpose stated. *On the contrary, it appears evident from an examination of the exhibit that the fruit would be subjected to a severe action by the brushes which would perform the principal work in removing the softened skin.* If the brushes are intended merely to rotate the fruit, it is not understood why the force exerted by the brushes in rotating the fruit would not also be sufficient to peel the same and why the jets would remove the skin which was unaffected by the stiff fibers of the brushes. It is true that the spray pipes in Dunkley's machine are near to the fruit but the jets are small, and it is not believed that the mass of water in these jets would be sufficient to have any appreciable action in removing the skin which had resisted the peeling action of the brushes as they rotated the fruit. *It seems apparent, therefore, that Dunkley does not rely upon jets of water as the principal means for peeling the fruit but that his machine, as repeatedly stated in his record, is one in which the brushes remove the skin which is subsequently washed away by the jets or sprays."*

The foregoing *finding of fact* by the Examiner was not modified by the decision of the Court of Appeals for the District of Columbia. That Court says:

*"But let it be conceded that Dunkley * * * relied chiefly upon the action of the brushes to remove the skins; * * *. It is to be observed that none of the counts define the water jets as constituting the sole peeling means. The counts of the issue are satisfied by a construction in which peeling water jets enter into the operation of removing the skins whether they be exclusively em-*

ployed to remove the skins or not. And *in neither machine, as described and constructed*, are the water jets shown to be the *exclusive* means of peeling. * * * Dunkley passes his fruit between the *brushes* to assist in peeling."

In other words, that Court simply found, *as a fact*, that water jets or, as expressed in Dunkley's patent specification, water *spray*, would to some extent, at least, *necessarily assist* in removing the skin because such skin had been disintegrated and, hence, in a condition to be *easily removed* and, therefore, said spray or jets properly could be termed "peeling-spray" or "peeling jets." As said by that Court:

"The skin of the peach having been *disintegrated* by the action of the hot solution of lye, that is to say, *cut or broken and loosened from the pulp*, was, *to say the least*, as easily removed by one jet as the other."

It is to be noted that, according to the Examiner, the rotary *brushes*, in the Dunkley machine, offered in evidence in the Interference, were about *six feet* long. It is also to be noted that the carrier or endless belt in the Dunkley machine, was made up of *brushes* so that, in addition to said *six feet* of rotary *brush* surfaces, the *whole* peaches, put through the Dunkley machine, were also subjected to the *brushing* action of said carrier *brush* surface. Of course, such whole peaches cannot move through the machine at the speed at which the carrier *brush* belt moves because their progress is retarded by the action of the rotary *brushes*

in revolving and turning them. Therefore, all portions of the peach are *brushed*, or as opposing counsel express it, *scrubbed* by the more rapidly moving *brush* surface beneath them.

As said Dunkley brush belt was an endless belt that extended more than the length of the six-foot rotary brushes, it embodied a brush surface over twelve feet in length.

According to the witness Lushbaugh, the rotary brushes, in the Vernon machine, were "close to 4 feet long" (R. 182). However, for the sake of the argument, we shall assume they were as long as Dunkley's rotary brushes, to-wit, six feet. The Vernon carrier belt was not a "*brush-belt*" as in the Dunkley machine. In other words, the surface of the Vernon carrier belt was *smooth* and not intended to *brush*, or as opposing counsel express it, *scrub* the peaches. The only function of the Vernon carrier belt was to carry or convey the peaches along under the water *jets or spray* and between the rotary brushes. By reason of said *spray*, such smooth carrier belt was constantly wet and, therefore, necessarily slippery.

Therefore, in the Dunkley machine, *as actually built*, there was, *in addition to any corresponding brushing surface in the Vernon machine*, more than *twelve feet* of brushing or scrubbing surface, a considerable portion of which would necessarily come into brushing or scrubbing contact with the slower moving peaches thereon.

The foregoing *brushing or scrubbing action* of the

Dunkley *belt brush* is that due to the same moving under the peach at a speed greater than the speed of the movement of the peach through the machine.

We shall now consider the additional or increased *scrubbing* action of all the Dunkley brushes, due to the fact that the Dunkley carrier belt has a *brush surface*.

On the opposite page are cuts of a number of drawings made for the purposes of this argument and to illustrate the points now being discussed.

Figure I is a cross-section of two rotary brushes, a carrier belt having a *smooth* surface and a *whole* peach resting on the carrier belt.

Figure II is a cross-section of an ordinary *friction* drive consisting of two friction pulleys, the one driving the other by frictional contact therewith.

Figure III is a cross-section of two rotary brushes, a carrier belt having a *brush* surface and a *whole* peach resting on the carrier belt. (Note: This Figure III is substantially a reproduction of Fig. 5 of the Dunkley patent, but showing the rotary brushes of Fig. 6 thereof, because said brushes were the ones actually used.)

Figure IV is a cross-section of two rotary brushes, a carrier belt having a *smooth* surface and a *half* peach resting thereon. In dotted lines is indicated another half peach in one of the many positions in which it would get while being conveyed through the machine

and turned and flopped over again and again by the rotary brushes.

In Fig. I the rotary brushes B *tend* to rotate the peach P at their own speed, due to the frictional brush contact between the peach and brushes. This tendency is to approach the conditions illustrated by the elements of an ordinary friction drive, such as that illustrated in Fig. II, wherein the driving pulley X turns the driven pulley Y by means of the frictional contact between the respective surfaces thereof. In the absence of any resistance to its rotation, the *driven* pulley would be rotated at the same speed as that of the *driving* pulley.

Obviously, in Fig. I the peach P tends to rotate at the same speed as the brushes B, but falls short of that speed because of the *slight* resistance offered by the smooth surface of the belt C on which P rests. It is obvious that the brushing effect of B upon P may be expressed as the *difference* between their respective speeds of rotation. If P rotated at the same speed as B, there would be no slippage between their respective surfaces and hence no brushing action. If P were held stationary, there would be the maximum of slippage between the surfaces of P and B and hence a maximum brushing effect.

It follows, therefore, that any influence which offers resistance to the turning of the peach P, in the same degree increases the slippage between it and the brushes B and, hence, increases the brushing effect

of brushes B. It is obvious that such a smooth surface belt C, especially if slippery with water, would offer a minimum resistance to the turning of the peach thereon, and, therefore, such peach P would tend to rotate at almost the same speed as the brushes B, with the consequent result of a minimum brushing action or effect.

In Fig. III the *whole* peach P rests on a carrier belt C having a *brush* surface. Here, too, the *tendency* of the brushes B is to rotate the peach P at the speed of rotation of the brushes. That tendency is resisted by the surface C on which P rests, but in this case that surface is a *brush* which obviously offers a resistance many times that of a *smooth and slippery surface*. The *brush* surface C, therefore, by greatly retarding the rotation of the peach P, very largely increases the slippage between it and the brushes B, and therefore, *greatly increases* the *brushing* action of the brushes B.

In view of the foregoing, it is manifest that the *brushing action* of the rotary brushes B, in Fig. III, in connection with a *brush* belt C, is as much greater than the brushing action of the rotary brushes B in Fig. I, in connection with a *smooth, slippery* belt C, as the amount of resistance to the turning peach offered by the brush surface C is greater than that offered by the smooth, slippery belt C.

The foregoing, however, is not the only difference between the respective brushing actions of the two

devices, one having a carrier with a *smooth* surface and the other having a carrier with a *brush* surface.

In Fig. III, the peach P either turns or is prevented from turning by the *brush* surface C. If prevented from turning, the brushing action of the rotary brushes B would be at a maximum. If the peach P is slowly turned, being merely retarded by the brush surface C, the brushing action of the rotary brushes B is correspondingly reduced. However, with any turning of the peach P on the brush C, the *brushing* action of said *brush surface* C must be added to that of the rotary brushes B. The slower P turns on C, the greater is the brushing action of B. The faster P turns, the greater is the brushing action of C. In either case, the total brushing action is the *sum* of that effected by the rotary brushes B and the belt brush C. *It must be apparent that the total brushing action is greater than in the case where the belt C has a smooth, slippery surface.*

In view of the foregoing, it is apparent that the *maximum turning effect* with a *minimum brushing effect* of the rotary brushes could be obtained by having the carrier belt *smooth* and slippery, yet Dunkley deliberately provided his carrier belt with a brush surface which not only increased the brushing effect of the rotary brushes, but also increased, to a large degree, the total brushing or scrubbing surface in his machine.

To use the words of the Court of Appeals for the

District of Columbia, Dunkley certainly "*relied chiefly upon the action of the brushes to remove the skins.*"

Notwithstanding the foregoing demonstrable facts, the lower Court, in its opinion herein, says that in the Dunkley machine "*the brushes serve the subsidiary purpose of agitating the fruit and of turning it for the purpose of presenting its different surfaces to the jets of water to enable them to do the efficient work of cleansing the skin after its disintegration by the lye-bath.*"

The foregoing finding is all the more remarkable when one stops to consider that:

1. Some of the Patent Office tribunals found that the Dunkley brushes *so completely* performed the *entire* peeling function that Dunkley was not entitled to claim the water spray or jets as "*peeling spray*," or, in other words, that he was not entitled to claim that the "*spray*" in his machine did *any part* of the actual *peeling* work.

2. The Court of Appeals for the District of Columbia only allowed Dunkley to retain the "*peeling-jet*" claims in his patent specification because, in its opinion, the "*spray*" in the Dunkley machine would necessarily, to some extent, assist in or "*enter into the operation of removing the skins*" and, therefore, could be properly called or termed "*peeling spray*" or "*peeling jets*."

The foregoing remarks are based upon a comparison of the devices respectively illustrated in Figures I

and III. As stated before, Fig. III illustrates the Dunkley structure shown in Fig. 5 of the Dunkley patent, with the substitution therein of the brushes shown in Fig. 6 of the patent. Fig. I differs therefrom only in respect to the carrier belt therein having a *smooth, slippery* surface. In making said comparison, we assumed that *whole* peaches were being operated upon. After the first tryout of the Vernon machine, only *half* peaches were peeled by it.

The smooth surface carrier belt in the Vernon machine was from an inch and a quarter to an inch and a half in width (R. 116). The rotary brushes could be adjusted so as to leave a space between the periphery of each of them and the adjacent edge of the belt and they were so adjusted (R. 106 and 116). The diameter of the brushes was about seven inches, which included about an inch and a half of brush fiber or hair projecting from the wooden core (R. 113). *The belt was in a plane even with or slightly above the center or axis of the brushes.* (R. 131).

As said by the witnesses, the rotary brushes were put wider apart and the carrier belt raised so that the brushes would have less brushing effect and would and could do little more than simply turn or flop the half peaches over and over during their progress through the machine.

Figure IV, heretofore referred to, illustrates a cross-section of the Vernon rotary brushes and smooth surface carrier belt, *as described by the witnesses.* On

said belt is indicated a *half* peach in full lines and, in dotted lines, another half-peach in a different position on the belt. Said figure is drawn to a smaller scale than the other figures, because the diameter of the Vernon brushes was greater than that of the Dunkley brushes.

A mere glance at Figure 4 is sufficient to show that the brushes could do little more than *turn or flop* the half-peaches over and over during their progress through the machine. It is inconceivable that such half-peaches could be acted on by the brushes to an extent sufficient to remove the disintegrated skin therefrom without the active co-operation of the water spray or jets striking the peaches. The shape of a half-peach absolutely precludes the possibility of it being brought into brushing contact with the rotary brushes *to an extent or with uniformity of action* sufficient to rely on said brushes alone to remove the disintegrated skin and produce a merchantable product. *It is apparent that the successful operation of the Vernon machine necessarily depended, to a great extent, upon the peeling action of the spray or jets present therein.*

Plaintiff's own witness Dawson testified said "spray" action was present and that the Vernon machine was used two years, which proves it was a commercial success. In fact, it was such a commercial success in 1902, that the California Fruit Cannery Association,

in 1903, installed three more Vernon machines of a greater capacity each.

Furthermore, plaintiff's testimony conclusively demonstrates that, in such a peach-peeling machine, the brushes alone *cannot* remove the disintegrated skin to an extent sufficient to turn out a merchantable product. That a merchantable product was turned out by the Vernon machine in 1902 cannot be questioned. That fact is demonstrated. *Therefore, said fact, according to plaintiff's own showing herein, can only be attributed to the presence of the peeling spray or jet action in the Vernon machine. There is no other answer.*

As said by plaintiff's counsel, Mr. Chappell:

"The patent (Dunkley) indicates that the brush acts somewhat on the peach in abraiding the surface, but the principal work is done by the sprays, and the sprays are particularly claimed as instrumentalities in the claims involved herein, and they are the principal instrumentalities we can show, because the machine will not peel a peach if forsooth the sprays of water are cut off; if the machine is then run, *although the peach has been soaked*, it will not be peeled, the peach passes too rapidly for one thing for the brushes to act upon it; *but if it was run slowly* the brush would simply move the peel to another place on the surface, and it would not be gotten rid of; *it needs the active agency of a spray of water striking against the peach to dash the disintegrated peel from the surface of it.* It is also particularly necessary that the spray act upon the peach because of the *irregularities* in the surface of the peach, the brush would not reach the cavity around the stem, or the *irregularities* on the crease of the peach, all of

which are reached positively by the spray" (R. 56).

Plaintiff's witness Dawson said the "spray" action was present in the Vernon machine, and, as said by plaintiff's counsel, Mr. Chappell, "it needs the active agency of a spray of water striking against the peach to dash the disintegrated peel from the surface of it."

Mr. Chappell's statement was made in reference to *whole peaches*. The truth thereof is even more apparent in connection with the peeling of *irregularly shaped half-peaches*, as a glance at Figure IV will show. *Mr. Chappell's statement is corroborated by Melville Dunkley (R. 83).*

In view of the foregoing, we respectfully submit that the lower Court's findings regarding the respective modes of operation of the Dunkley and Vernon machines, are not only unsupported by the proofs, but are inconsistent with plaintiff's own proofs which themselves conclusively demonstrate the Vernon machine to be a complete anticipation of the Dunkley patent.

V.

PLAINTIFF'S PROOFS OF DATE OF INVENTION.

Under the above heading, opposing counsel discuss the Dunkley testimony herein and attempt an "*explanation*" of the vital conflict between it and the Dunkley 1910 testimony. The explanation will not hold water. In fact, to borrow the language of Sir

George Jessel, in *Ex parte Hall*, 19 Ch. Div. 580, it reminds one of a colander because it is "*so full of holes.*"

At page 56 of the "Reply Brief of Appellee," said explanation is thus stated:

"In giving the interference testimony the Dunkleys either referred to the completed operative machine including a lye-tank, *or they were honestly mistaken in saying that the frame work was built in July, 1903*, if such construction can be placed upon their testimony. Under the first theory there can be no pretense of a change of testimony. Under the second theory it is merely the case of an *honest mistake*, subsequently corrected by the discovery of record evidence. A witness is always allowed to correct an error inadvertently made, and it would be a very *harsh rule* to hold that such correction convicts him of perjury. We submit that there was in substance no change of testimony. Judge Van Fleet was of that opinion, and he had a *much better opportunity* to decide the matter than is afforded by a mere reading of this record."

The "*much better opportunity*" referred to by opposing counsel was undoubtedly the "*opportunity*" of listening to and being influenced by his gross misrepresentations to the effect that the interference testimony was the *same* as that given by the Dunkleys in this case, in respect to Model Exhibit No. 10 being built in 1902. The opinion of the lower Court indicates on its face that full credence was given by the

lower Court to opposing counsel's statement to such effect.

In the Interference proceeding, the Dunkleys were called on to give the *complete history* of the Dunkley invention involved in such interference, to wit: the Dunkley "*brush-spray-pipe skin-removing means.*" In giving said *complete history*, neither they nor any other witness even remotely intimated that any model, machine or part thereof was used, bought or made prior to the period of William Brunker's employment at South Haven in 1903.

The two Dunkleys, in giving such alleged *complete history*, stated some sketches were made in 1902 but that the same had been lost. Reference to said alleged *lost* sketches shows that the Dunkleys were giving an alleged *complete history* of the Dunkley peeling machine.

Therefore, the Dunkley interference testimony to the effect that the model machine was made in 1903, cannot be explained on the theory that they misunderstood any particular question and thought it referred to the structure involved in the interference plus a lye-tank that had nothing to do with any interference count or issue.

In the Interference proceeding they were called on to give the *complete history* of the Dunkley "*structure*" which was particularly described in the questions as *only* comprising and *only* being the "means for removing the *previously* disintegrated skin."

In view of the fact that they were called on to give such "*complete history*" of the invention, they cannot now pretend they thought they were only asked the date of construction of Model Exhibit No. 10 *plus* an alleged lye-tank therefor and, therefore, did *not* say, mention, intimate or hint anything about the alleged construction of such Model Exhibit No. 10, in 1902, *without* such alleged lye-tank, *because they were not asked the question when such Model No. 10 was made exclusive of any such alleged tank*. They were asked such specific question, again and again and, also, *the whole line of questions* asked them called for a *complete history* of the invention.

*"It would be idle to say that his testimony at the second trial was not contradictory of his testimony at the first. The only explanation offered for the change of testimony is that the witness was not asked that question. This explanation is not true in fact. The witness was interrogated to the fullest detail concerning the whole matter within his knowledge. * * **

"This Court has gone its full length to protect the rights of jury trial against encroachment by the courts under any guise, and one of the rights of jury trial is the right to have the credibility of the witness determined by the jury. Generally speaking there are no limitations upon this rule, but there are limitations upon the application of it. The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the Court. This Court has seldom been confronted with a more marked case of the kind than is presented here. We are united in the opinion that it is our plain

duty to so hold. *To hold otherwise would make a farce of judicial proceedings.*

"* * * Defendant's motion to direct a verdict should have been sustained. Reversed."

The foregoing language is found in the opinion rendered in the case of *Graham vs. Chicago & Northwestern Ry Co.*, 143 Ia., 604, 119 N. W., 708. Said case was one for personal injuries. The plaintiff's intestate had jumped on a train, clinging to a dangerous position on a vestibule, and was brushed off as the train crossed a viaduct. Two companions, who were with him at the time, had been rescued by the train crew, and the negligence alleged consisted of the failure of the train crew to use proper diligence to rescue the deceased after (it was claimed) they had knowledge of his position of danger. One of the principal witnesses for the plaintiff was a companion of the deceased, by the name of Hoyer, who, on the second trial (from which the case was appealed) swore that after being himself rescued, he had seen the deceased on the outside of the train. His testimony on this point was material, but flatly contradictory of his testimony at the former trial, *when he had not mentioned that important fact*. His explanation was that, at the first trial, he "*was not asked that question.*" However, as the Court said, his explanation was not true. "*The witness was interrogated to the fullest detail concerning the whole matter within his knowledge.*"

Likewise, in the case at bar, the Dunkleys, in the Interference proceeding, were "*interrogated to the fullest detail concerning the whole matter within their knowledge*" and relating to the *complete history* of the Dunkley invention. And, in giving such *complete history*, neither of them even remotely suggested that any peach peeler or part thereof was made in 1902.

In *Baier vs. Camden, etc. Ry. Co.*, 68 N. J. L., 42, 52 Atl., 215, the Court, reversing a judgment entered upon a verdict for plaintiff in a personal injury case, said:

"There was a suit brought by the plaintiff for this injury, which was tried in 1898, and resulted in a non-suit. That case was not reviewed, but a new suit was brought which resulted in the verdict for the plaintiff now contested. On the first trial there was nothing in the testimony of the plaintiff's witnesses which showed that the boy jumped from the wagon as the result of a threatened collision with the car, or that he was forced to jump from the wagon by any mismanagement of the trolley car by the motorman. *The evidence of the same witnesses on the last trial is substantially different from what it was on the first trial. Such testimony is not entitled to any favorable consideration. The witnesses have either forgotten the circumstances, or have intentionally perverted the facts. There would have been no error in granting the motion to nonsuit.*"

In view of the fact that the Dunkleys, in the interference proceeding, were called on to give the *com-*

plete history of the Dunkley peach-peeling invention, it is idle to now say that they did not testify to the alleged building of the Model Exhibit No. 10 in 1902, because they were not asked or did not understand they were asked to state when said model, exclusive of any alleged lye-tank therefor, was built.

Such an attempted explanation of this change in their testimony reminds us of the case of *Angus v. Craven*, 132 Cal., 691. In that action, the plaintiffs took the deposition of Mrs. Craven. It came out that she claimed to have been married to Senator Fair; and she was asked when, where and how she married him, to which she replied that they were married on a given date in San Francisco and by a written contract. Later she applied for a family allowance in the estate, and in support of her claim of marriage said that she had been married in San Francisco on the date already referred to and by contract, *but she added that afterwards the marriage was solemnized before a justice of the peace in Sausalito*. When taken to task for not having so stated upon her deposition, she explained that *she had not been asked the question*.

This was supposed at the time to be the high-water mark of audacity; and we cannot believe there will be any more success here than there was there.

Apparently, opposing counsel was not quite satisfied with his attempted explanation of the Dunkley *change of testimony* based on the theory that, in the

Interference, they were only asked or understood they were only asked the date of construction of the Model Exhibit No. 10 *plus* a lye-tank (that had nothing to do with the structure involved in the interference) and, therefore, testified therein in 1910, that said model Exhibit No. 10 was made in 1903. We can well appreciate his dissatisfaction with any such explanation. *It is a challenge to human intelligence and human credulity.*

Opposing counsel, therefore, offers an alternative explanation of said "*change.*" He says: "Under the *second theory* it is merely the case of an *honest mistake* subsequently corrected by the discovery of record evidence. A witness is always allowed to correct an error inadvertently made, and it would be a *harsh rule* to hold that such correction convicts him of perjury."

Opposing counsel apparently thinks it would be a "*harsh rule*" to hold that such an alleged correction convicts the Dunkleys of perjury but that it would *not* be a "*harsh rule*" to give full credence to such alleged "*correction*" and, by reason thereof, *necessarily convict Campbell and Bruncker of perjury and* *plaintiff's* ~~representations~~ *representations of subornation of perjury.* However, we are not asking for the application of any *artificial rules*, whether they be deemed "*harsh*" or not. We are asking merely for an application of the *ordinary rules that govern human conduct.* The Dunkley testimony is so inconsistent with said last

mentioned rules that it is unworthy of credence. As said by the Supreme Court in *Atlantic Works v. Brady*, 107 U. S., 192:

“Interested as he is in the result of the suit, his own testimony cannot be allowed to prevail against a course of conduct so utterly at variance with it. *It may be true, but one cannot give it effect as against what he himself did and did not do without disregarding the ordinary laws that govern human conduct.*”

Regarding the necessity of said “*change*” to meet the exigencies of this case, opposing counsel, at page 53 of said brief, says:

“It is scarcely to be presumed that a witness would unnecessarily commit perjury. When perjury is committed it is generally in pursuance of a dire necessity required by some exigency of the case. There was no such necessity or exigency in this case, because July, 1903, was a sufficient date for plaintiff’s purpose. Hence there could have been no motive for perjury.”

There was, however, just such “*a dire necessity*,” just such “*an exigency*” in this case which required the said “*change*” in the Dunkley testimony in order for plaintiff to win. In fact, the lower Court’s decision is *expressly based* upon such “*change*” in the Dunkley testimony carrying back *a year* the date of the construction and first use of Dunkley’s first machine. In its opinion, the lower Court says:

“* * * that the plaintiff’s assignor conceived

this device and put it to use at a time *at least a year* prior to the time claimed by Campbell; and *as this is a question on which the case turns*, the result is that the decree must go for the plaintiff" (R. 699).

The "dire necessity" requiring such "change" in the Dunkley testimony arose out of the following facts:

Defendant had proved, beyond any doubt and by a mass of oral and documentary evidence, Grier's conception of the invention in the 1902 peach season, the commencement by Grier, in April, 1903, of two commercial machines embodying such invention, and the *completion* and *public use* of said two machines and the *sale* of one of them, as early as July, 1903.

The Dunkley Interference testimony was merely to the effect that Dunkley, Sr., in August, 1902, conceived the invention and, in September, 1902, told his son, Melville, about his *mental* conception of the invention and gave to him some sketches illustrating it, but these sketches were lost; and that he did nothing more until July, 1903, when a mere model of the invention was made. Under the well established principals of law set forth in our opening brief, said facts would be insufficient to constitute Dunkley the first inventor. Grier conceived the invention at least as early as Dunkley could hope to prove his own conception and Grier was the more diligent in commencing to reduce and in actually reducing the invention to practice.

Furthermore, in view of the proof of Grier's commencement of two commercial machines in April, 1903, the Dunkleys certainly appreciated the difficulty of winning the case by only attempting to prove a *mere disclosure* of the invention in 1902, by the father to the son. Proof of such fact could be only the oral testimony of father and son, both highly interested witnesses. They, therefore, obviously saw the necessity, the "*dire necessity*" of showing that Dunkley, Sr., did something, before Grier's machines were commenced in April, 1903, other than *merely telling* his son about a *mental conception* and handing the son some sketches *which were lost*.

The foregoing shows the presence of the "*dire necessity*" of changing their testimony in order to win and the interference testimony, as well as the testimony of Campbell, Brunker and Mapes herein, proves their "*changed testimony*" to be false.

According to opposing counsel's "*alternative explanation*," the Dunkleys, in 1910, made an *innocent mistake* of *one year* in respect to the date of construction of model Exhibit No. 10. Opposing counsel now ask the Court to hold that their testimony, *given six years later*, is sufficient to prove said date *correctly*, even though it is contradicted by Campbell, Brunker and Mapes; by Mapes' account book and by the testimony of the other witnesses in the interference!

What a remarkable coincidence that Verhage, a witness in the Interference, should have made the same

innocent mistake and testified Campbell made the wooden frame, Exhibit No. 10, in 1903!

What a remarkable coincidence that defendant's representatives were able to "hire" Campbell and Bruner to likewise testify Campbell made said wooden frame in 1903!

Certainly the high-water mark of audacity was not reached in the Craven case.

Regarding the Dunkley *change of testimony* to meet the exigencies of this case, the following authorities are pertinent.

In *Healy v. United Traction Co.*, 115 App. Div., 868, 101 N. Y. Supp., 331, it is said:

"Upon the former appeal it appeared from the record that plaintiffs' intestate attempted to cross in front of an approaching car when the car was only 35 feet from her. We were of the opinion that her attempt to cross under those circumstances was clearly unwarranted in the exercise of reasonable care on her part, and the plaintiff had failed to show that she was free from contributory negligence. The only witness of the accident has now changed his testimony and says that when she started to cross the track the car was from 75 to 100 feet from her. * * * *It amounts, however, to almost a denial of justice when a defendant's property can be taken solely upon the evidence of such a witness. * * * Especially is this so when the verdict must be sustained, if at all, upon a change in his testimony upon a material matter between two trials.*"

In *Fisher v. Central Vermont Ry. Co.*, 118 App. Div., 446, N. Y. Supp., 513, it is said:

*"We have, therefore, the plaintiff at the first trial directly contradicting the plaintiff at the second trial on a question of vital and controlling importance. * * ** In my opinion, in view of the irreconcilable variance between the two statements, the latter given, as it was, after plaintiff's mind had been illumined as to the nature of the testimony essential to a recovery, the plaintiff did not sustain the burden of proof on this branch of the case. This in the first instance was, of course, a question for the jury; but the verdict of a jury is subject to judicial review, and, when the Court can plainly see that the verdict rests on no substantial basis, such verdict should be set aside.

* * *

"It would be a disgrace to the administration of justice, if a court, charged with the responsibility of reviewing the facts, should be held bound by the verdict of a jury, when it is apparent that evidence has been deliberately changed, or added to, to meet the exigencies of the case as pointed out upon a former appeal."

On page 57 of said reply brief, opposing counsel say:

"But after all, how will the defendants dispose of the testimony of Harvey C. Schau?"

The 1910 testimony of the Dunkleys and of Verhage proves the Dunkley testimony to be false and, therefore, necessarily proves Schau's testimony to be likewise false. The testimony of Campbell, Brunker and

Mapes also proves Schau's testimony to be false. It is quite obvious that, if the Dunkleys were willing to give false testimony herein, they would not hesitate to persuade Schau to give false testimony. Furthermore, after the lapse of *thirteen years*, Schau, who was only a boy during the period concerning which he testified herein, was very likely easily persuaded to believe what the Dunkleys might assure him was the truth. He, of course, wished to serve them and his testimony shows he had no particular means of fixing the respective dates when the model machine and the first commercial three-line machine were built. Therefore, after said lapse of *thirteen years* and with no means of fixing any dates, Schau undoubtedly was perfectly willing to accept, as true, any statement made by the Dunkleys and possibly he believed what he testified to. As Caesar said some years ago:

"Quod fere libenter homines id, quod volunt, credunt."

However, on its face, the Schau testimony shows that he was just *one year* out in his statements.

Both Campbell and Brunker testified that the model machine was made in 1903 in the basement room adjoining the engine-room in the Dunkley South Haven factory. Verhage, in the interference, also said Campbell made said machine in 1903 and set it up in said basement room. Verhage testified as follows:

"Q. 10. Will you indicate about the time, so

near as you can remember, that the *first wooden frame* was made?

"A. In July, 1903.

* * *

"Q. 15. At what place in the plant was the machine set up?

"A. *It was first set up in the basement in the north wing.*

"Q. 16. Who set it up there, if you know?

"A. Mr. Campbell and myself" (Dunkley Interference Record, p. 95).

Schau says he saw such machine in such basement room in November, 1902. Of course, it was not in existence then. It was, however, in such basement room in November, 1903, and that was the time when he first could have seen it. About the same time, Mapes saw the machine in the same basement room (R., 639).

The balance of Schau's testimony conclusively proves he was just *one year out* in his dates. He says he saw one or more of said machines at the Kalamazoo factory of the Dunkley Company in July, 1903 (R., 515). The testimony of Campbell shows that the *second* machine, designated herein as the "*first commercial machine*," was not made until 1904, and that it was made at Kalamazoo; installed at the South Haven factory in August, 1904, and first used about September 1, 1904. It is quite obvious, therefore, that it was in July, 1904, and *not* in July, 1903, that Schau saw said machine at the Kalamazoo factory. The

said facts show Schau was just one year *too early* in all of his dates.

The testimony of Campbell and Brunker to the effect that the model machine was the *only* peach-peeling machine at the Dunkley establishment in 1903, and the testimony of Campbell to the effect that the *second* peach-peeling machine, to wit: the first commercial machine, which was a *three-line* machine, was not built or used *until* 1904, is corroborated by the interference testimony of the witness Newton. He said he worked in the Dunkley South Haven factory during the latter half of July and during August, September, October and part of November, 1903. During that period he saw the model machine there (Int. R., 118). Regarding the time, when he saw the *second* Dunkley machine, Newton said:

"Q. 38. What was the *second* machine that you saw, and did that differ in any way from the first?

"A. The principle of the machine was the same, but with *three times* the capacity.

"Q. 39. When did you see that machine working, *if ever*?

"A. *In 1904.*

"Q. 40. What pressure of water was delivered to it?

"A. *City pressure*." (Int. R. 119).

At page 59 of their reply brief, opposing counsel state:

"Another criticism made against the Dunkleys is that they produced no written records. But

counsel seem to have overlooked the testimony given by M. E. Dunkley at page 445 of the record, to the effect that in 1912, the Dunkley cannery was destroyed by fire and their records were lost."

Unfortunately for opposing counsel, the said statement of M. E. Dunkley is proved untrue, *so far as the loss of their records is concerned.*

The cannery destroyed by fire in 1912, was the South Haven cannery, *not* the main factory of the Dunkley Co. at Kalamazoo, where the Dunkleys lived. The South Haven Cannery was closed during the winter months or off seasons, and it was at the Kalamazoo factory that Dunkley's *first commercial machine* was built by Campbell during 1904. The tank therefor was made in Kalamazoo by the Clark Engine & Boiler Company of that city and, on January 30, 1904, it was delivered to the Dunkley establishment in Kalamazoo (R., 537). The "brush-spray-pipe skin removing means" of such machine was also made in 1904 in said Dunkley factory at Kalamazoo (R., 536-7). That the Dunkley Company records were kept at the main establishment in Kalamazoo, *the home of the Dunkleys*, is conclusively proved by plaintiff's production of Bruncker's letter and the Clark Engine Company letter. *The production of said exhibits proves the records of the Dunkley Company were not lost in the fire down at the South Haven Cannery.*

The failure of the Dunkleys to produce documentary evidence showing the purchase of the various

parts of the first two Dunkley machines, coupled with their failure to remember the names of the firms from whom said parts were bought and accompanied by their failure to remember the names of their employees who built or operated the first two peach-peeling machines, as well as their failure to remember many other facts and circumstances, make most pertinent the following remarks of the Supreme Court in *Luco et al. v. United States*, 64 U. S., 515:

“There are many more satisfactory tests of the truth of parol testimony than that of character of the witnesses. Where the facts sworn to are capable of contradiction, they may be proved by others not to be true; and when they are not, the internal evidence is often more convincing than any other. *A shrewd witness, who is swearing falsely to something which cannot be disproved by direct testimony, will confine his recollection wholly to that single fact, professing a want of recollection of all the facts and circumstances attending it.* An unexperienced witness, whose willingness to oblige his friend exceeds his judgment, will endeavor to give verisimilitude to his tale by a recital of imaginary circumstances. A stringent cross-examination will generally involve the latter in a web of contradictions, which will be in a measure evaded by the other, with the answer that ‘*he does not recollect.*’ When many witnesses are produced to the same facts, and they contradict one another in material circumstances, they prove themselves unworthy of credit.”

Regarding plaintiff's failure to introduce corrobor-

ating *documentary* evidence, opposing counsel, at page six of "Brief of Appellee," says:

"The clear oral evidence of three witnesses should be sufficient. However, in place of any documents, a piece of *real* evidence, the frame work of the identical machine itself, is produced and identified in court. A document would have to be a drawing or some description of it. The real thing itself is much the better."

At times, opposing counsel's contentions might be considered simply amusing if one could overlook their affront to one's understanding.

There is no dispute as to the building, *at some time*, of Model Exhibit No. 10. Defendant's witnesses Campbell and Brunker testified that such model machine was built in September and October, 1903. The said model exhibit, therefore proves absolutely nothing *in dispute* in this case. *Said model is adaptable to whatever date may be assigned to it.*

As said in *Eck v. Kutz*, 132 Fed., 763:

"But the complainant is a highly interested witness, and his son is not much better; nor does the cam cylinder prove anything by itself, however primitive, being adaptable to whatever date may be assigned to it. The earlier date contended for rests, therefore, upon the mere say so of the father and son, without any corroboration or convincing circumstance, which hardly fulfills the high degree of proof required when the date of an invention is material in order to escape anticipation. Clark Thread Co. v. Williamantic Linen Co., 140

U. S., 481; *Westinghouse Electric & Mfg. Co. v. Saranac Lake Erie Light Co.*, 108 Fed., 231."

On page 66 of their reply brief, opposing counsel, after referring to a Patent Office interference proceeding between Dunkley and the witness Mapes, says:

"Thereafter, Dunkley gave no more machine work to Mapes. These facts serve to explain Mr. Mapes' attitude in this controversy."

The testimony, upon which said *positive* statement is based, is that given by Mapes and reads as follows:

"MR. CHAPPELL—Q. Did you do any work for the Dunkley Company after the cherry-pitter interference?

"A. I could not tell you; I could not tell you *whether I ever did, or not*" (R. 649).

There is no testimony to the effect that the Dunkley Co. stopped giving work to Mapes at any time. However, a little matter of that kind is of no importance to opposing counsel when he is endeavoring to discredit an opposing witness. We have already referred to his misrepresentation of the testimony given by Campbell and Brunker as a basis for his vituperative attack on them.

On page 65 of such reply brief, it is said:

"Again, when he (Brunker) was asked regarding certain dates, he said (R. 629):

"A. You see, I can't remember about the

dates; I can't give you any dates at all; the only dates I have tried to give you have been wrong.'

"And yet this man's testimony is relied on for proving facts beyond a reasonable doubt."

The witness Brunker very frankly admitted he could not fix *exact* dates and, therefore, throughout his testimony, only attempted to fix the date of any particular occurrence by stating its relation to other occurrences. At the very commencement of his direct examination, he stated:

"Q. State whether or not you at any time were employed by the Dunkley Company?

"A. Yes. I was employed at that time, yes; I was employed in the cherry season; I can't remember the date; they were packing cherries when I went there.

"THE COURT—Q. In 1902, you say?

"A. *In 1903.*

"MR. WHITE—Q. Where did you go to work for that Company?

"A. He sent me down to South Haven.

"Q. For what period of time were you working at South Haven for the Dunkley Company?

"A. Probably 4 or 5 months; I am not quite sure" (R. 598).

Fortunately for us, opposing counsel themselves fixed the exact dates of Brunker's term of employment by producing Brunker's letter to the Dunkley Company and dated June 12, 1903 (R., 610). Said letter sought employment and it was after the date thereof, that Brunker entered the Dunkley Company's employ.

Regarding the period of his employment, S. J. Dunkley said:

"Q. When did William Bruncker enter the employ of the Dunkley Company and when did he leave it?

"A. I don't think he stayed over three or four months; he entered the employ sometime in June, 1903; that is my recollection" (R. 506).

Bruncker says the first work he did was to help Campbell install some can seaming and vacuum machines (R. 609). He next helped Campbell build the eighty-odd-foot table at which the women could sit while peeling peaches *by hand* (R. 599). (Note: In our opening brief, we directed attention to the fact that the building of said immense *hand-peeling* table, in July, 1903, proved that the Dunkleys, *at that very time*, had *no* peach-peeling machine which would necessarily do away with *hand-peeling*.)

Bruncker was then put to pickling peaches and it was *after* he commenced such work that Dunkley spoke to him about using the lye-process for removing the skins from such pickled peaches. Bruncker then did his experimenting with a lye-solution and it was *after* such experiments, that the first suggestion was made by Dunkley that a machine be built to do the work of peeling in connection with the use of the lye-process. Thereafter, Campbell commenced work on the first model-machine (R. 600-601). *Bruncker's narrative of the events and circumstances leading up to the build-*

ing of the peach-peeling machine, necessarily shows that the machine referred to by him, was the first one built, to wit: the one-line model machine.

According to Melville Dunkley, the Michigan peach season began in August (R. 420) and therefore Brunker's work of pickling peaches and his preliminary experiments with a lye-solution necessarily began during August, 1903.

In view of the foregoing, it is evident that Brunker's inability to fix *exact* dates in no way weakens his testimony. The *exact* dates, of the various events testified to by him, were fixed by *plaintiff's witnesses*.

The Court will note the unobtrusive manner in which opposing counsel runs in the statement that "And yet this man's testimony is relied on for proving facts *beyond a reasonable doubt*." Opposing counsel apparently thought that his use of the phrase "*beyond a reasonable doubt*" would create *some* impression but not an impression sufficient to make one pause to consider whether or not defendant was *actually* endeavoring to prove anything, *beyond a reasonable doubt*, by Brunker's testimony.

Of course, there is no burden, whatever, on defendant to prove anything relative to the date of Dunkley's invention. On the contrary, under the authorities cited in our opening brief, the burden is *on plaintiff* to prove that date *beyond a reasonable doubt*. Brunker's testimony was introduced for the purpose of showing

that plaintiff's efforts to prove said date *beyond a reasonable doubt* were based on false testimony.

However, it was only necessary for defendant to rely on Brunker's testimony to the extent of raising a reasonable doubt as to the truth of plaintiff's testimony regarding said date.

The raising of such a doubt is all that is necessary to render plaintiff's said proof insufficient.

In *Westinghouse Co. v. Saranac Co.*, 108 Fed., 222, it is said:

"The patent being anticipated, if the date of application be taken as the date of invention, the burden rests upon the complainant to satisfy the court that the invention was made at an earlier date. There is no presumption in favor of such a patent. The burden which rested upon the defendant in the first instance has been transferred to the complainant and it must furnish the Court with convincing proof that the anticipation has been anticipated."

In *Michigan Cen. R. Co. v. Consolidated Car-Heating Co.*, 67 Fed., 121, the Circuit Court of Appeals for the Sixth Circuit, through Judge Severns, Judges Taft and Lurton concurring, said:

"The evidence shows that the device, as patented, has been in public use for some time prior to the date of his application. If it be permissible, as contended, to maintain his patent upon evidence, dehors the proceedings in the patent office, that he made the invention at an earlier date than is to be presumed from his application and patent, so as to carry it back to antedate the public use,

the proof should be clear and unequivocal that he was the original inventor. Eagleton Manufacturing Co. v. West Bradley & Cary Manufacturing Co., 2 Fed., 774, 777; Rob. Pat. Sect. 1026, note 14, and cases cited. There is much evidence in this record upon that subject. Without going into detail, it suffices to say that we have serious doubt whether Cody was the original inventor of the device represented by this combination of his patent. If the evidence in its favor were fortified by the presumption of validity afforded by the patent in ordinary cases, we might think it right that that should turn the scale, and that this claim in the patent should be held valid. But the presumption does not apply in such circumstances and the burden of proof is on the other side. We do not think it is sustained."

Has plaintiff proved Dunkley's date of invention by *clear, unequivocal and convincing proof*?

Why, even opposing counsel, in his "*alternative explanation*" of the "*change*" in the Dunkley testimony, asks this Court to hold that, in 1910, *six years* before the trial of this case and *six years* closer in time to the occurrences testified to, the Dunkleys made an *innocent mistake* of *one year* in fixing the date of construction of Dunkley's first model machine; he then asks this Court to hold that the Dunkley testimony, given *six years* later, for the purpose of correcting said *innocent mistake*, is *clear, unequivocal and convincing proof* of the date of construction of the machine notwithstanding said testimony:

1. *Is directly and flatly contradicted by Campbell,*

Brunker and Mapes; by the entries in Mapes' account book; and by the testimony of other witnesses in the Interference.

2. *Is disproved by its own self-destructive inconsistencies.*

3. *Is disproved by its inherent improbabilities.*

4. *Is disproved by facts shown in the case beyond any question or dispute.*

5. *Is uncorroborated by any documentary evidence which, on its face, proves anything.*

6. *Is oral testimony given thirteen years after the occurrences testified to.*

7. *Is oral testimony of two highly interested witnesses—father and son.*

8. *Is oral testimony replete with "I can't remember" and "I don't know" answers in respect to the most important and vital surrounding facts and circumstances.*

9. *Is changed testimony to meet the exigencies of this case.*

On such character of testimony, plaintiff bases its prayer for judgments running into hundreds of thousands of dollars.

*"It amounts, however, to almost a denial of justice when a defendant's property can be taken solely upon the evidence of such a witness. * * **
Especially is this so when the verdict must be sustained, if at all, *upon a change in his testimony upon a material matter between two trials."*

Healy v. United Traction Co., Supra.

"The defendant having antedated the filing of the application by record evidence so convincing that it stands conceded, the burden is upon complainant to carry the date of invention still further back by evidence that convinces *beyond a reasonable doubt*. * * *

"The rule in such cases is very strict. It is so easy to fabricate or color evidence of prior invention, and so difficult to contradict it, that proof has been required which does not admit of reasonable doubt."

Dey Time Register Co. v. W. H. Bundy Recording Co., 178 Fed., 818.

VI.

THE GRIER PRIOR USE.

Under the above heading, the Grier proofs are discussed by opposing counsel, commencing at page 18 of their reply brief. The criticism thereof is so puerile as hardly to be deserving of answer. The said proofs amount to a demonstration. The oral testimony is fully corroborated by documentary evidence. The books of Grier's Company, Pasadena Canning Company, are in evidence and show all the transactions of that company from its very beginning in 1902. In our opening brief, we referred to the various items therein showing the various steps taken in connection with the building of Grier's first two machines. Notwithstanding the foregoing, opposing counsel again and again remarks that Mr. Grier's testimony is based on *mere recollection*.

The said books show that, *at least* as early as July 30, 1903, the Grier machines were completed, because, on that date, there was entered in the books a charge, for one of said machines, against the East Side Canning Company, to whom it was sold (R. 309).

The Eastside Canning Company, at least as early as August 1, 1903, put the Grier machine into actual operation. Mr. Taylor, of that company, testified that the machine was in operation for two or three days before he bought the pump therefor from the Baker Iron Works (R. 381).

The *original bill* for said pump is in evidence and shows that the pump *was delivered August 3, 1903* (R. 382).

Opposing counsel says, at page 22 of the reply brief, that: "It is quite evident from the foregoing " that the use of the East Side Canning Company's " machine was after the installation of the pump . . ." notwithstanding Mr. Taylor expressly said the machine was used for two or three days prior to such purchase and *that it was such use that disclosed the necessity of having a pump to give more pressure* (R. 381).

Finley referred to a partition about the Pasadena Canning Company's machine in 1903, but the testimony of Grier and Lusby shows that such a partition was not put up till 1904, and that Finley was, therefore, mistaken as to the date of its erection. Whether it was or was not there at any time is abso-

lutely immaterial, but opposing counsel is forced to grasp at straws. Regarding the erection of such a partition in 1904, Grier says:

"A. 1904; and once in a while that lye-tank would boil over, and to protect them a fence was put around there to keep the splash from coming out and scalding anyone" (R. 337).

On page 35 of the reply brief, opposing counsel indulges in an attempt to mislead so puerile as to be positively pitiful. He says:

"We do not lose sight of the fact that some book accounts were offered in evidence by the defendants, presumably for the purpose of fixing dates; but they are insufficient. They are copied at pages 296-7 of the record, the material ones appearing on page 297. The first item is under date of May 29, 1903, and consists of a charge against the East Side Canning Co. for what is designated there as 'Tool & Fix. \$278.00.' This entry fails to identify anything with sufficient clearness to enable us to know what it covers. It would appear to refer to tools and fixtures, but what those tools and fixtures are is not apparent from the entry itself. Certainly there is nothing in the entry to show on its face that it refers to a peach peeling machine. Grier says it refers to grasshoppers; *but that is merely his recollection*, and furthermore such grasshoppers had been used for scalding tomatoes for many years."

The first *two items* on said page 297 of the record herein, read as follows:

(Journal page 38)	May 29, '03.
194 East Side C. Co.	278.00
20 Tool & Fix.	278.00

(Ledger page 194)	
1903	East Side Canning Co.
May 29 Scalders 38	278.00 (Other Items)

The first item is the *journal* entry and the second item is the *ledger* entry of the *same transaction*. It is obvious that a double entry system of books was kept by the Pasadena Canning Company, and, in such a system, certain accounts are opened and debited or credited according to the nature of any particular transaction. It is perfectly obvious, that the Pasadena Company kept one account under the name of "tools and fixtures" account. In the said journal entry said account is credited with the sum of \$278.00 and the Eastside Company is debited with the same amount. The same transaction is carried forward into the *ledger*, where it is seen that it was a "*scalders*" or "*grasshopper*" that the Eastside Company was charged for on May 29, 1903. It will be noted that, in the *journal* entry, appears the page of the ledger to which the entry is carried forward, to wit: page 194. In the *ledger* entry appears the journal page from which the entry is brought, to wit: page 38.

We might take a charitable view of the foregoing

Fig. 1

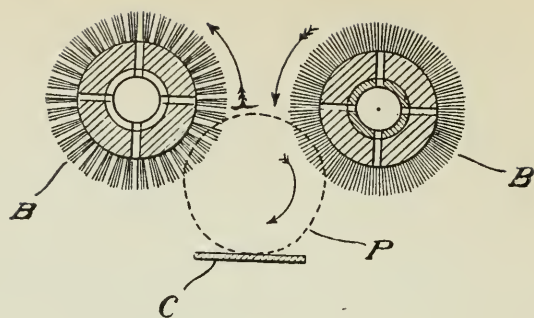


Fig. 2

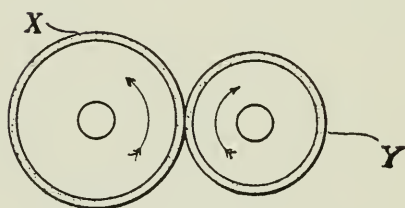


Fig. 3

DUNKLEY

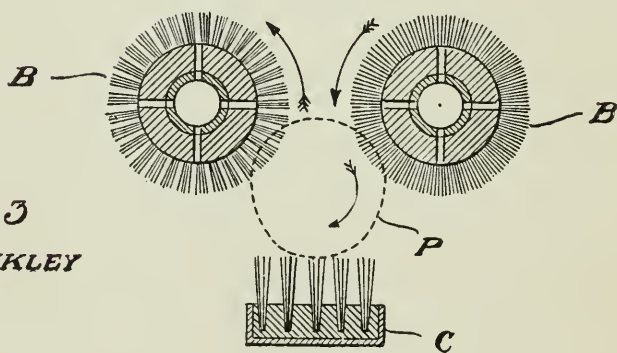
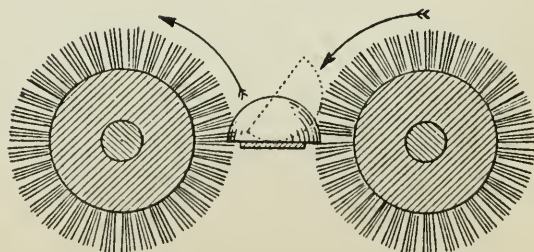


Fig. 4

VERNON



and attribute opposing counsel's remarks merely to his ignorance of bookkeeping. However, it is impossible to believe he overlooked the *second* item on said page, because, after indulging in the foregoing remarks, he immediately discusses item number *three* on said page of the record. The second item is *too plain and clear* to have been overlooked "in the seclusion of his office" and in the absence of "the heat of verbal debate."

Query—If the plaintiff-appellee has a meritorious case, why is so much misrepresentation deemed necessary in the presentation thereof?

VII.

DEFENSE THAT NOT DUNKLEY BUT GRIER ORIGINAL AND FIRST INVENTOR.

Commencing at page 35 of our opening brief, we discussed the above specified defense. Section 961 of *Robinson on Patents* very clearly points out the essential features of such a defense. Said section reads as follows:

"Sec. 961. Third Defense: Denial That The Alleged Inventor Was The First Inventor of The Patented Art or Instrument.

"The third defense consists in a denial that the patentee or his assignor performed the inventive act producing the alleged invention *at an earlier date* than any other inventors *in this country*. This defense concedes that the patentee or his assignor is a true inventor of the art or article in

question, but *denies that he was its first inventor*. It is equivalent to *either of two averments*:

“(1) That rival inventors had completely *conceived* the idea of means embodied in the invention, and were using *due diligence in reducing it to practice at the time* the patentee or his assignor *conceived* the same idea; or

“(2) That although the patentee or his assignor had *first conceived* the idea he did *not use due diligence in reducing it to practice*, and that in the meantime some *later conceiver but more prompt reducer* had perfected the invention.

“This *defense* raises the *same issue* which is presented in interference cases in the Patent Office and in proceedings in equity to annul a rival patent, and *is sustained when the evidence establishes either one of its equivalent averments*.”

The foregoing, is a very clear statement of the matters to be proved in sustaining the defense that the patentee was not the *original and first inventor* of the invention covered by his patent. Our patent laws do not provide for the issuance of a patent to one *other* than the “*original and first inventor*.”

If a patent be issued inadvertently to one *not “the original and first inventor,”* it is void.

Therefore, Section 4920 of the Revised Statutes specifically provides that one of the defenses to a patent suit is that the patentee “*was not the original and first inventor*.”

Among other things, said Section 4920 provides:

“In any action for infringement, the defendant may plead the general issue, and, having given

notice in writing to the plaintiff or his attorney thirty days before, may prove on trial one or more of the following special matters:

“Fourth. *That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented.*”

As Mr. Robinson says, you can prove the patentee is not the “*original and first inventor*” in two ways:

1. The patentee is *not* the first inventor, if another inventor, in this country, *conceived* the invention *first* and, although *second to reduce it to practice*, used due diligence in so reducing it to practice. [Note: The *due diligence* is necessary in order to connect up the *conception date* with the *reduction to practice date* so as to entitle the inventor to his *conception date* as the *date of his invention*.]

2. The patentee is *not* the first inventor, if another inventor, in this country, *conceived* the invention *second* but *reduced it to practice first*, the patentee *not* having used *due diligence* in *reducing his invention to practice*. [Note: In this instance, the patentee is not entitled to his *conception date*, as the *date of his invention*, because he does *not* connect up his *conception date* with his *reduction to practice date*, by *due diligence*.]

The foregoing principles are well established and there is no difficulty in applying them, notwithstanding the strenuous efforts of opposing counsel, in re-

spect thereof, to create "*confusion worse confounded.*" Their argument on this phase of the case is of the cuttlefish type.

On page 68 of their reply brief, they even go so far as to use, as one of the topic headings, the words: "Defense of Surreptitious Patenting," as though we, in our argument of this case, were relying on such a defense.

In line with Mr. Robinson's remarks regarding the defense that the patentee is not the *original and first inventor*, it is stated as follows in 30 Cyc., at page 873 thereof:

"First Inventor. The first inventor is the one who first has a mental conception of the invention, *provided he exercises diligence thereafter in adapting and perfecting it*, but as against a rival claimant who first reduces the invention to practice the *burden* is upon the *first conceiver* to show *diligence*. The party first to reduce to practice is *prima facie* the first inventor, but the man who *first conceives* and in a mental sense *first invents* a machine, art or composition of matter *may date his particular invention back to the time of its conception, if he connects the conception with its reduction to practice by reasonable diligence on his part so that they are substantially one continuous act.*"

In view of the foregoing principles, it is apparent that:

1st. *If Grier first conceived and first reduced to practice, he is, of course, the first inventor without*

regard to the question of diligence, and in such case the Dunkley patent is void.

2nd. *If Grier first conceived but was second in reducing to practice, he is still the first inventor, provided he used reasonable diligence in reducing to practice, and in such case the Dunkley patent is void.*

3rd. *If Grier was the second to conceive but the first to reduce to practice, he is still the first inventor, provided Dunkley did not use reasonable diligence in reducing to practice, and in such case the Dunkley patent is void.*

The proofs conclusively show that Dunkley had *no conception* of the invention until after the commencement of the Michigan peach season in August, 1903, when he *first* discussed the lye-process with Brunker after the latter had been working a short time in pickling peaches. As the Grier machines were completed in July, 1903, and one of them actually sold during that month to the Eastside Company, it is quite apparent that Grier was the *first* inventor.

Even if Dunkley be accorded August, 1902, as his date of conception, nevertheless Grier would still be the first inventor, as Dunkley was not diligent in reducing the invention to practice, he having allowed two peach seasons to go by without making a commercial machine. It is recalled that Dunkley's

first commercial machine, to wit: the *three-line* machine, was not built until 1904 and was first used during the 1904 peach season. The making of a "*model*" is not a reduction to practice. However, the Dunkley model machine was not completed until after October 6, 1903, practically at the end of the Michigan 1903 peach season.

In view of the foregoing, it is apparent that, from no point of view, could Dunkley be considered diligent in reducing to practice, even if he be accorded August, 1902, as his date of conception. However, no credence can be given plaintiff's proofs of any Dunkley activities prior to August, 1903.

Furthermore, plaintiff's proofs are insufficient to show Dunkley's date of invention antedated the *use* of the Grier machines.

At page 73 of their reply brief, opposing counsel say:

"Dunkley has exhibited unusual diligence, extending over a period from the date of his initial conception in 1902 to the issuance of this patent in 1914, a period of twelve years; whereas Grier has not only failed to show such reasonable diligence, but has been slothful and negligent. If he ever had any rights he has slept on them. Had he filed his application for a patent, he would have been thrown into interference with Dunkley, just as Beekhuis was, and the matter could have then and there been settled. On the contrary, he goes to sleep for twelve years and then suddenly awakes and claims rights of invention superior to those of Dunkley."

The foregoing remarks are nothing more and nothing less than arrant nonsense.

The only "*diligence*" involved is the "diligence" of reducing a mental *conception* of an invention to practice, that is, embodying such mental "*conception*" in a commercially operative device. Upon such *reduction to practice*, the inventive act is *complete* and the *conceiver* is thereupon *an inventor*. What he does thereafter is absolutely immaterial so far as concerns the question whether he *is* an *inventor* and so far as concerns the question of the *date* of his invention.

After reducing his invention to practice in July, 1903, Grier dedicated the same to the public by reason of his failure to apply for a seventeen-year patent monopoly thereof.

After reducing his invention to practice in July, 1902, Vernon likewise dedicated to the public the free use of the apparatus shown in his patent, by reason of his failure to attempt to patent such apparatus or machine.

We are not, in this litigation, asserting any rights of Grier other than his rights *as one of the general public* entitled to freely use the invention dedicated to such public by him in July, 1903.

His failure to apply for a patent subsequently to July, 1903, cannot alter the *fact* that, in July, 1903, he *completed* an *inventive act* and, therefore, in July, 1903, was *an inventor*. And the date of such *inven-*

tion does not depend on what he did *subsequently* to July, 1903. Said date is determined by two factors:

1. Date of his *conception*.
2. His *diligence* in reducing such *conception* to practice.

If he was *diligent* in so reducing his mental *conception* to practice, then the *law* accords him, *as the date of his invention*, the *date of his mental conception thereof*.

That Grier was diligent in reducing his invention to practice, is shown by the fact that, after conceiving the invention in August or September, 1902, he commenced building two commercial machines in April, 1903, and completed them in July, 1903, and, in July, 1903, sold one of them to the Eastside Canning Company. As said machines could only be used during a peach season, he certainly was diligent in getting them ready for commercial use during the very *next* peach season following that during which he *conceived* the invention.

Grier's date of invention is, therefore, September, 190²~~3~~, and there is nothing in the record that casts any doubt on the proofs of said date.

At page 45, of our opening brief, we discussed Section 812 of *Macomber on Patents*, which was cited by opposing counsel in the lower Court as sus-

taining their contention that, in proving prior invention by another, who had not applied for a patent, the defendant was limited to the *date of use* of such prior inventor's invention. In said discussion, we referred at length to the case of *Webster Loom Co. v. Higgins*, 105 U. S., 580, which fully sustains our contentions on this phase of the case. It is to be noted, opposing counsel avoid reference to such authority.

In support of his contentions, on this phase of the case, opposing counsel, Mr. Miller, cites no authority.

In support of his similar contentions, opposing counsel, Mr. Chappell, cites another section of Macomber, we having demonstrated that Section 812 of that writer's book, cited by opposing counsel in the lower Court, was inconsistent with and contradicted by the *Webster Loom Co.* case, attempted to be digested in such section.

The new section of Macomber, so cited, to wit: Section 808, has no bearing on the defense now being discussed by us. It does not pretend to relate to the defense that a patentee is not the *original and first inventor*, provided for in Section 4920 of the Revised Statutes.

As stated by the Circuit Court of Appeals for the First Circuit, in *Automatic Weighing Machine Co. v. Pneumatic Scale Corporation*, 166 Fed., 294:

“It is not uncommon for two persons to conceive an improvement in an existing device about the same time, and *all the law exacts of the first conceiver in order to protect him in his right to the invention is that he shall proceed with reasonable diligence, to reduce the invention to practice,* or to file an application for a patent in conformity with the statutes.”

It is to be noted that an inventor, in order to protect *his own* right to use his *own* invention is not required to file a patent application thereon. If he desires to *prevent others* from using it, he must secure patent protection.

But such first inventor is not required to apply for a patent on his invention, in order to prevent a subsequent inventor stopping him using it by means of a patent issued to such subsequent inventor. Such a patent is void, because not issued to *the original and first inventor* of the invention.

As stated in said decision, “*all the law exacts of the first conceiver in order to protect him in his right to the invention is that he shall proceed with reasonable diligence to reduce the invention to practice.*”

If such first conceiver so reasonably reduces his invention to practice and discloses it to the public, no subsequent inventor can deprive him or the public of the right to use the same, because such a subsequent inventor is not entitled to any monopoly thereof under the patent laws of the United States.

In said discussion, it is expressly stated that such first conceiver has a choice of two methods of protecting his *own* right to use his *own* invention, *one* of them being to reduce it to practice by the exercise of reasonable diligence, and *the other* being the filing of an application for a patent thereon.

Grier, by the exercise of reasonable diligence, reduced his conception to practice and disclosed and dedicated his invention to the public. No subsequent inventor can lawfully prevent Grier or the public from using such invention.

At page 49 of our opening brief, we quoted, at length, Section 383 of *Robinson on Patents*, but, through inadvertence, said author was not given credit for such quotation, in which is discussed the question of diligence in the reduction to practice of a mental conception of an invention.

CONCLUSION.

We respectfully submit that the decision of the lower Court should be reversed and these suits ordered dismissed.

Respectfully submitted.

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